No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections: JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

JOINT APPENDIX
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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,	)	RECORD
v.	)	11413
JOSEPH ROGER O'DELL,	)	

Defendant.

September 11, 1986

* * *

[10] THE COURT: That is water over the dam, Mr. O'Dell.

MR. O'DELL: All right. I just want to bring it up, Your Honor. I am asking for an instruction to the jury about the three convictions, meaning there is no parole for the defendant; and I also want to quote to the Court without argument about future dangerousness that is going to be presented, and I quote. I quote *Juricek v. Tex.* and *Barefoot v. Estelle*.

I also would ask the Court to instruct to the jury an explanation of what vile and wanton means in aggravated, *Smith v. Commonwealth*, 219 Va. 455.

Although this may be water over the dam, the victim's family was crying in front of the jury while the mannequin was displayed; and the defendant made a motion prior to this trial, a pretrial motion, to prohibit that type of stuff because of prejudicial effect it would have on the jury; and it has happened; and I want that on the record, Your Honor; and I would ask – I would ask the Court that beings that mannequin was so blatantly

displayed in front of the jury where the jury had to brush against it to come to and from the jury box to the outside of the court, I would ask

* * *

[16] MR. TEST: Thank you, Your Honor. May it please the Court, good morning, ladies and gentlemen.

We are now beginning the procedure which you were informed in voir dire is the second phase of a capital murder trial, the sentencing phase. I state to you now that during the presentation of the evidence in this phase the Commonwealth will prove to you beyond a reasonable doubt both of the approved sentencing procedures under which you may sentence this defendant to death in the electric chair.

Those two sentencing alternatives – either or both – first, that this case itself, the murder of Helen Schartner, was so outrageously or wantonly vile in that it involved aggravated battery to her person beyond the minimum necessary to commit the act of murder.

On that issue you already have all the necessary evidence presented. You have seen the photographs, and you have heard the testimony of Doctor Presswalla. She [17] died by strangulation, and you have seen the marks that were on her neck. That is the minimum act necessary

to have committed this murder. The aggravated battery involved each and every other wound.

The second alternative under which you may find that the defendant is deserving of the death penalty is that because of the prior past history involving both his criminal record and past accounts of violence, his continued life presents a continuing serious threat to members of society. The Commonwealth will prove beyond a reasonable doubt that alternative also.

Ladies and gentlemen, after considering all the evidence that is presented in the sentencing phase, both the aggravating circumstances and those mitigating circumstances as they may be presented, the Commonwealth will submit this issue to you confidently that within your collective judgment you will reach the just decision. Thank you.

Thank you, Your Honor.

THE COURT: Mr. O'Dell.

MR. O'DELL: Throughout the entirety of this case you have never heard my side of the story, and there's a reason; and you will hear my side before today is over. You didn't hear nothing about how that crime really happened. All you heard was lies. The [18] defendant is going to attempt today to show you the lies that were told in this case, to show you the cover-ups that was done by that man right there. I'm going to show you.

There was evidence kept from you that would have showed you beyond a shadow of a doubt that I didn't commit this crime. When I get on that stand today, I'm going to show you why I did not kill that woman.

He would have you to believe the defendant, because of his past record, committed this vile crime; but the defendant didn't do this crime; and I don't blame you people for bringing back that verdict – because I would have brought back the same verdict if I had been told all those lies that he told you.

Today I hope I can show you that – just how these people here have covered up this case and lied and showed you people how terrible this man here is. I admit – and I will show you on the stand today that I got a bad past record; but that don't mean I killed this lady. Because I didn't kill this lady, and I will show you on the stand today evidence from my own mouth – and I want you to think about it – that shows why didn't this man do certain things to show you that I didn't do it. No.

He covered it up. He brought you all [19] circumstantial evidence that was full of innuendos, bloodstained evidence.

He kept you from the fight. I want to show you about the fight, why the people that was in the fight with the defendant was never brought up here, why the defendant was held in jail twenty months, and why all his witnesses disappeared.

There is a whole lot of things you people haven't heard, and I think after today that you are going to wonder why. There is people out there in that audience wondering why this wasn't brought before us. Because they know the truth. And I would like for you people to know the truth.

I just wished I had it to do all over again because I would take that stand – and I will tell you people why I didn't take the stand. Because I got a past record that dates back to the time I was sixteen years old; and I was afraid if I took that stand, that because of my past record, that you would say, "Well, he did that crime."

Well, I took a chance and didn't get up there and present the evidence. It's too late now, so what I want to do, ladies and gentlemen, I want you to hear all his evidence. You are going to hear what a bad record I've got, and most of it will probably be the [20] truth. I'm ashamed of it. I'm ashamed of my past, but you will also see that I tried to keep myself straight. You will see where I tried to settle down.

They tried to tell you I lived out of a car. I don't know why they told you that. Because that's a lie. I didn't live out of my car.

Tried to say I was a night person. Maybe I was. I went out and enjoyed myself after I worked, but he didn't tell you I had a steady job working real good, making good money.

No, ladies and gentlemen, you was fooled. You was tricked, but I don't blame none of you – because I would have brought back the same verdict. I sit there and empathize. I said if I was on that jury, what would I do? I would have done the same thing you all done.

I would have done the exact same thing because you was fed lies after lies after lies, and I think after I get up there today and show you the lies, I think that you'll believe me. You'll believe me – because it's the truth.

I just wished I could bring the witnesses in now and I wished I had the witnesses that were hid from you all, the evidence that was hid from you people.

It's a travesty of justice because a person has [21] to defend himself because he is poor and can't afford an attorney. I was put in this position. I couldn't help it – because I don't have no family, but I had to defend myself, and I tried the best I could.

Now, I told you when I began this case that if you really believed that I killed this lady, to give me the death penalty – because I would deserve it and I still mean that. I am not going to get up here and try to fool you people, try to trick you people like he did into thinking that I am a good guy, that I deserve a life sentence.

I am not going to try to do that. Because if you still think that I deserve the death penalty, then invoke it. I ask you to do that, but I tell you right now I did not kill that lady.

I don't know who killed that lady. I know I never seen the lady before in my life, but circumstances – this man right here would have you to believe – would have led me to believe the way it was presented – that I did in fact do it.

I am not a murderer. I am not a killer. I might have been a thief in my childhood and coming up. I might have made a few mistakes, but I am not a killer, and I am definitely not a rapist – and sodomy turns me off. To me that is the most atrocious thing a [22] person can do – because that's against God. It wasn't meant to be that way.

You don't know how I felt letting you people hear this kind of mess. I was embarrassed. It was all I could do to constrain myself.

I know that you people has heard some gross things. That mannequin sitting in front of you all day long with that blood all over it where you had to walk by it and see these bloody clothes this lady was killed in and get – and you see my bloody clothes up there where I was supposed to have killed this lady.

Well, I ask you this. If what the Commonwealth said was true, how come the defendant was supposed to have carried the body? Why wasn't blood all over the front, all over the arms? How come there wasn't spatters where someone was hit in the head with a gun like he said?

How come there was no soil on the defendant's car from the field? How come there was no soil that he told you about on those pants that was mixed with the blood? If the soil samples had been taken, ladies and gentlemen, which they were and they was hid – I know he is going to object because he doesn't want you to know the truth.

Go ahead, Mr. Test.

[23] MR. TEST: These comments are improper for an opening statement in this phase of the trial.

THE COURT: Try to give you great latitude, Mr. O'Dell, but they are improper.

MR. O'DELL: Your Honor, I was not allowed to let these ladies and gentlemen know my forty-seven reasons why I couldn't have been guilty of this crime.

THE COURT: Mr. O'Dell, the guilt phase of the trial has been tried.

MR. O'DELL: I just want them to know. I will just say this. They hid the evidence from you. It's all over with now. This might be decided on appeal, but I ask you to listen real close. Listen and determine whether you think the truth was told to you or not.

Thank you.

THE COURT: Mr. Test.

MR. TEST: Your Honor, before calling my first witness, I would move to introduce certain documents into evidence.

Your Honor, I would ask that the next number – I believe it's 69, Your Honor. I believe it's Commonwealth's Exhibit Number 69, Your Honor, and I'd ask that they be marked respectively A, B, C, and D.

Commonwealth's Exhibit 69, Your Honor. A.

[24] (Document handed to Mr. Ray and Mr. O'Dell for examination.)

THE COURT: Mr. Test, it would be 70.

MR. RAY: 70.

MR. TEST: 70-A, Your Honor.

MR. O'DELL: Your Honor, I would object to them being introduced because they are not authenticated. However, I'll stipulate to the introduction if he will allow me to introduce these transcripts and so forth without any objection.

THE COURT: They are admissible in the form they are in.

MR. TEST: They are authenticated, Your Honor.

MR. RAY: The second page isn't, Your Honor. This is certainly the penalty phase. They should have the second page authenticated. We object to the admissibility of that.

THE COURT: Overruled.

MR. RAY: Exception, Your Honor.

MR. TEST: Commonwealth Exhibit 70-B, Your Honor.

THE COURT: Got any objections to B?

MR. O'DELL: Sir?

THE COURT: Objections to 70-B or not?

(Conference between Mr. O'Dell and Mr. Ray)

[25] MR. O'DELL: No, there is no objection, Your Honor.

THE COURT: Okay.

MR. TEST: 70-C, Your Honor.

THE COURT: Any objections to 70-C?

MR. RAY: Yes, sir. As I remember the authentication statute in Virginia –

THE COURT: I am talking about 70-C.

MR. RAY: Oh, no. Go ahead, Mr. O'Dell.

MR. O'DELL: No, I don't have no objection to it.

MR. TEST: 70-D, Your Honor.

THE COURT: Any objections?

MR. RAY: Mr. O'Dell?

MR. O'DELL: No, sir. The only thing, Your Honor, I still want to quote *Juricek v. Tex.* and *Barefoot v. Estelle* with reference to those being introduced.

THE COURT: They will be admitted. All will be admitted.

(Commonwealth's Exhibit Number 70-A through -D were marked in evidence by the Court.)

MR. TEST: Ladies and gentlemen, Your Honor, and for the record, I will simply state what Commonwealth Exhibits 70-A, B, C, and D are. Commonwealth Exhibit [26] 70-A is the certified conviction from the City of Norfolk, Virginia, on the 7th day of November, 1957, convicting the defendant, Joseph O'Dell, of one count of grand larceny.

Commonwealth Exhibit 70-B is the certified copy of the records of the court of Norfolk, Virginia, on the date Monday, September 25, 1961, convicting the defendant, Joseph O'Dell, of five counts of grand larceny and five counts of armed robbery.

MR. O'DELL: Objection, Your Honor. He has mischaracterized the charge. There were five charges on unauthorized use.

THE COURT: Let me see it.

MR. TEST: The charge reads grand larceny and unauthorized use of a motor vehicle.

MR. O'DELL: Objection, Your Honor.

THE COURT: The court order reads grand larceny, unauthorized use of a motor vehicle, and certain numbered documents, and for robbery on a certain number of indictments.

MR. O'DELL: Your Honor, I've got it right here.

THE COURT: And that is the extent of the description and nature of the crimes.

MR. O'DELL: Well, I have a copy here, Your Honor, and it's –

[27] THE COURT: Do you agree with that, Mr. O'Dell?

MR. O'DELL: No, sir, I don't. I have got my copies here. It's got the Corporation Court seal on it.

THE COURT: Yes, sir.

MR. O'DELL: And it's five charges unauthorized use of a motor vehicle, 1961.

THE COURT: Let me see what you have.

(Document handed to the Court for examination.)

THE COURT: Mr. O'Dell, you are missing – how are you missing the word "robbery" on the fourth line of the second paragraph?

MR. O'DELL: Your Honor, I had to dig these out of my archives. They are twenty-five years old.

THE COURT: Look at the fourth line in the second paragraph. The first word of the second line. Robbery.

MR. O'DELL: Second paragraph on this sheet here?

THE COURT: That's right.

MR. O'DELL: There is nothing wrong with that, Your Honor. I am objecting to the unauthorized use. You are taking [sic] about where it says robbery on two, four, six, eight, ten?

THE COURT: Let me see it again.

[28] MR. RAY: Your Honor, I think the central objection is that it is not grand larceny but it's –

MR. O'DELL: It's a lesser offense. It's unauthorized use of motor vehicles.

THE COURT: The indictment reads grand larceny, unauthorized use. The conviction reads whereupon is considered by the Court guilty of robbery of a certain number of indictments and guilty of unauthorized use of a motor vehicle. That's what the finding was. The finding was not grand larceny per se but unauthorized use.

MR. RAY: Yes, sir.

THE COURT: All right. Well, that's the same as in the order which has been submitted.

All right. You may proceed.

MR. TEST: Thank you, Your Honor.

Ladies and gentlemen, Commonwealth Exhibit 70-C, a certified copy of a court order from the County of

Goochland, State of Virginia, dated 11th of August, 1965, finding the defendant, Joseph O'Dell, guilty of the charge of second degree murder and fixing his punishment at twenty years.

Commonwealth Exhibit 70-D, a certified exemplified copy of proceedings before the Circuit Court of the Fourth Judicial Circuit in Florida, County [29] of Duval, finding the defendant, Joseph O'Dell, guilty, 5th of February, 1975 – I'm sorry – that's the date of the offense – in the fall term – I'm sorry.

MR. O'DELL: September 23rd.

MR. TEST: Dated September 23, 1975, finding the defendant guilty of one count of robbery and one count of abduction, fixing his sentence at ninety-nine years.

MR. O'DELL: Objection, Your Honor.

THE COURT: Yes, sir.

MR. O'DELL: Mischaracterizing the charge.

MR. TEST: Robbery and kidnapping, Your Honor. I'm sorry.

MR. O'DELL: Object again. It was not robbery and kidnapping.

THE COURT: Well –

MR. RAY: Sir, Mr. O'Dell has requested an out-of-court hearing.

THE COURT: After you hear what I have to say, then perhaps you won't find the problem. The charge was

that of – two indictments – two charges in the indictment. Did by force, violence, or assault, or by putting in fear feloniously rob, steal, and take away from the person or custody of a certain person, certain property of value, to-wit: Money, the property of Donna Doyle.

[30] Second count reads without lawful authority forcibly or secretly confine or imprison one certain party against her will, with the intent to cause her to be secretly confined or imprisoned against her will.

There are two indictments which are not characteristic of our system, which are called judgment and sentence, state prison, signed by the judge; and it refers to, one, the defendant having been found guilty of the crime of kidnapping.

MR. O'DELL: Your Honor, I'm going to object to all of this being read in front of the jury.

THE COURT: And the second one is that of robbery, again, signed by the judge.

MR. O'DELL: Your Honor, I asked for an out-of-court hearing, and I object to it being read in front of the jury because there is a mistake in the record, and I have reason to show you that there is a mistake in that record, but it's already been read in front of the jury so it doesn't make any difference.

THE COURT: There is an official document certified to –

MR. O'DELL: It is wrong. I have documentation to show it's wrong.

THE COURT: Ladies and gentlemen of the jury, – if you will step out for a moment.

* * *

[35] DONNA DOYLE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TEST:

Q Would you state your name for the record and the ladies and gentlemen of this jury.

A My name is Donna Doyle.

Q Mrs. Doyle, could you be good enough to spell your last name for us?

A D-o-y-l-e.

Q Mrs. Doyle, where do you live?

A I live in Jacksonville, Florida.

Q Where did you live in 1975?

A In 1975 I lived on Bamberg Road, which is also in Jacksonville, Florida.

Q Mrs. Doyle, I want to direct your attention to a specific date and time in February, 1975, and ask you if in [36] the early part of the month of February, 1975, something unusual happened to you.

A Yes. On Wednesday, February 5th, I was working in the convenience store that my husband and I operate.

It was a Zippy Mart, and at 4:15 in the morning a man came in, pulled a gun, robbed my store, dragged me out, tried to rape me, beat me up.

MR. RAY: Objection, Your Honor.

THE COURT: Sustained.

MR. RAY: Sir?

THE COURT: I said sustained.

MR. TEST: On what grounds, Your Honor? She is relating what happened to her.

MR. RAY: Your Honor, he knows better than that. That is not in the charge. We request an out-of-court hearing as we did yesterday on this, Your Honor.

THE COURT: Members of the jury, step out.

(The jury was excluded from the courtroom, and the following took place out of the presence of the jury:)

MR. RAY: Your Honor, we respectfully ask as yesterday to preview this witness. You've got evidence in the record that's not charged, the crime of rape.

MR. TEST: That matters not, Your Honor, whether he's been charged or convicted of any prior crimes.

* * *

[40] Bring the jury in.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Ladies and gentlemen of the jury, you are to disregard the comment by the witness concerning the characterization paraphrased as attempted rape. You are not to consider that expression.

Continue, Mr. Test.

MR. TEST: Thank you, Your Honor.

BY MR. TEST:

Q Mrs. Doyle, at the time this happened, were you alone in the store or was anyone else there?

A I was not alone. I had worked from four in the morning till eleven o'clock in the evening. Don, my husband, came in to relieve me since he normally worked the night shift. He was sick at the time. When I left the store, I went home and went to bed.

The phone rang. It was Don saying he was so sick, could I please come back in and take over the store? I got there I guess about 1:00 – maybe 1:30 in the morning. He was burning up with a fever.

We always kept a cot in the back storeroom. There are a lot of times when we try and catnap back there. [41] It was a twenty-four-hour operation. Sixteen, eighteen hours a day is not unusual. Don went back into the storeroom to lay down.

Q Besides the two of you, was anyone else in the store?

A Customers in and out occasionally; but at that hour of the morning, there just aren't that many people on the road.

Q Okay. Now, describe exactly what happened as the person came into the store, what was said and what was done.

A It was about 4:15, and Don had finally settled down and gone to sleep, and I sat down on some milk crates in back of the register, and I saw some headlights through the window, and I stood up and a customer was coming in, and a man came in, came up to the counter and asked for a pack of Winstons.

I reached down to pull the cigarettes out from the counter; and when I put them on the counter, he pulled out a gun and said, "Give me all your money."

One thing that is good about Zippy Mart – they train you what to do in case you are robbed, which that is give the person the money, don't argue. Just give it to them.

Money can be replaced, but a life can't, so I grabbed all the bills out of the register and I gave them to [42] him.

Q After you gave the person the money, what took place next?

A He hesitated for just a moment and said, "Let's go," and I said, "No," and he said again, "Let's go," and I was trying to angle back toward the other side of the counter to get away from him, and I said, "I'm not going," and said, "If you scare me anymore, I'm going to faint," and he had the gun on me and he said, "If you faint, you won't be getting up."

I kept thinking about Don back in the storeroom. We had two rifles back there – a rifle and a shotgun – and I thought if I could get back to the storeroom, I would be

okay. I started walking toward the other end of the counter back toward the storeroom.

Q As you walked back there, what did the person do?

A He kept the gun on me and he kept saying, "Come on. We're leaving. I don't have all day," and I kept saying, "I can't. Look, it's cold outside." It was wet. It was raining. I just said, "Let me get my jacket."

I walked around the end of the counter and started to go toward the storeroom door, and I could see Don laying on the cot, and he was still asleep.

Q After you saw him laying there, what did you do?

[43] A The man started walking toward the storeroom door, and all I could keep thinking about –

Q Mrs. Doyle, don't tell us what you thought. Just tell us what you did. As he approached you –

A As he approached me, I started walking toward him.

Q What happened as you walked toward him?

A He grabbed hold of me and said, "Let's go," and I pulled away, and I said, "I'm not going." I just kept saying, "I'm not going," and he told me he was – I was going with him, and if I didn't, he would shoot me; and if I didn't believe he would shoot me, I better think again; and I told him, "I believe you would kill me but I am still not going," at which point he fired the gun.

The next thing that happened was he grabbed me around the neck like this and dragged me out of the store. (Demonstrating)

As he opened up the car door and as he was trying to shove me inside the car, my leg got stuck between him and the car door; and the harder he would shove and push with the gun, I couldn't move. I was stuck. I kept telling him, "I'm stuck. I can't move"; and I guess finally he understood what I was saying and he backed up; and as I started to straighten up in the car, I saw Don, my husband, in the store; and he was going like this. (Demonstrating)

[44] Q Now, you are gesturing. The court reporter cannot type your gesture.

A I'm sorry.

Q What do you say he was doing?

A He was waving his arm. I interpreted that to mean get out of the other car door.

Q Which car door had you been pushed into?

A The driver's side.

Q So what did you do when you saw your husband? Where was he standing – your husband?

A He wasn't standing. The front window was basically clear, but there was like a painted partition that covered the lower portion of it. I could see Don over that partition, and I thought he was gesturing for me to get on the other side of the car and get out.

Q All right. What did you do?

A I tried to get over to the other side of the car and get out.

Q How did you try to do that?

A I scrambled to the other side and I tried to grab hold of the door lock and I tried to jangle it open first, and it was locked, and I tried to pull the door lock, and every time I would go to pull the door lock, I found out for the first time in my life about automatic door locks. They are controlled from the driver's side.

[45] The man had gotten in the car in back of me; and every time I would go to open the lock, he would lock it and he was jabbing me in the side with the gun and kept telling me – I was crying. He kept telling me that if I tried to get away, he was going to shoot me; and he slammed the car door and we took off.

He told me repeatedly that if I tried to escape, he could kill me. If I screamed, he'd kill me.

We backed out of the parking space and out of the driveway and onto Rogero Road and onto a road that was directly across from the store.

Q You said the name of a road. Can you spell that for us?

A R-o-g-e-r-o.

Q All right. Go ahead.

A I felt like this wasn't happening. Things like this don't happen to people. You read about them. You see it on TV but it doesn't happen to you; and the man started telling me if I don't stop crying, he was going to kill me. He kept saying, "I'm going to kill you."

I managed to bring myself under control somewhat; and all of a sudden I realized that when this was all over I would have no idea what this man looked like or the car that I was in. I didn't know where we were. All I had done since we had gotten into Jacksonville was worked, so we [46] didn't know any of the side streets, so I was sitting over on the passenger side, and I looked over at him and took a look and saw what he looked like, and then I – underneath the streetlights as we passed them, I started reading what the name of the car was on the dashboard one letter at a time, and it said Electra 225.

We didn't drive very long, and we pulled up in back of some buildings; and I said to the man, "Can I get out now?" I said, "I don't know where I am. There is nobody around. Can I please get out?" and he said, "Not until you let me fuck you," and I said, "No."

MR. O'DELL: Objection, Your Honor.

MR. TEST: This is her recollection, Your Honor. It's admissible testimony.

THE COURT: Mr. O'Dell, this is admissible.

MR. O'DELL: Well, I'm objecting because I've got the transcript here, and it didn't say anything like that in the transcript.

THE COURT: You will have an opportunity when the time comes.

MR. O'DELL: Just something to prejudice the jury.

BY MR. TEST:

Q Please continue, Mrs. Doyle.

[47] THE COURT: Overruled. Exception noted. Go ahead.

A Yes, sir. I'm not too clear on some of the things that happened in the car. I've tried for eleven years not to dwell on this.

MR. RAY: Objection, Your Honor.

BY MR. TEST:

Q Mrs. Doyle, understanding that, please tell us what you can remember.

A All right. All right. O'Dell, the man sitting over there, grabbed me and dragged me over to his side of the car; and I told him everything in the world. I told him I was pregnant. I told him I had a social disease. I figured maybe I could just talk to him and he would let me go, and it didn't do any good, and he had his arm around my shoulder holding me, and he put his hand on my breast, and I pushed his hand away, and he grabbed hold of me around the neck, and I guess he had the gun up on the dashboard, and he hit me in the head with the gun, and he hit me several times, and he kept hitting the top of the car with the gun. He just couldn't seem to get it up high enough to get enough force into it.

I'm not sure exactly what happened after that, but there was a lot of conversation going on. I kept talking, trying to keep myself under cont [48] ol. I felt if I could talk and I could get him to talk, maybe I'd come out of this all right.

He told me his name was Billy, and again he started trying to get physical. He pushed me on my back, and I managed to get my legs up, and he had the gun, and he started swinging at me again with the gun, and I got my legs up, and I started kicking him, and he didn't like that at all, and he kept yelling at me, "Stop kicking me, stop kicking me"; and I told him if he would stop hitting me with that gun, I'd stop kicking him.

We talked for a little while. I talked about anything. It started to rain. I would say, "Oh, gee, my dogs are getting wet."

A little while later he asked me if I knew what the word necrophilia was, and I said yes, and he told me that it didn't matter to him whether I was alive or dead but he was going to have sex with me, and wouldn't it be better if I were alive? And I remembered something my husband had brought home from Vietnam, and I told O'Dell that the Geneva Convention allows warfare but it doesn't allow cannibalism. They can kill you but they can't eat you.

Q Is that something you told the defendant?

A Yes, it is, and once you were dead, what difference does it make anyway?

[49] Q All right.

A We were sitting in the car again, and once again he started trying to get physical, and he started to choke me, and he put his hands around my neck, and he started squeezing, and I kept trying to push him away, and I couldn't reach him to push him away, and finally he stopped, and we talked some more. Kept saying that he

was going to have sex with me and as soon as it was over, he would let me go. When I kept saying no, he grabbed hold of my neck again and I couldn't breathe, and he wouldn't stop squeezing.

I could feel my tongue coming out of my mouth, and finally I guess I shook my head and said yes, I would do it; and he backed off and I started to unbutton my blouse; and I couldn't do it. I just couldn't undress. I couldn't do it. And please understand that I had – I knew that when he was done with me, he was going to kill me; and I stood there and I said, "I'm sorry. I can't do this"; and he pulled the gun out again and he put the gun to my head and he cocked the trigger, and I had had it.

I just wanted this over with, and I said, "Well then, pull the damned trigger and let's get this shit over with"; and I started to say the Lord's Prayer out loud, and he told me to shut up and hit me in the back of the head with the gun and moved back over to his side of the car.

A little while later we were sitting there and I [50] was noticing the police cars. I could see police cars a couple of blocks over. It's a long block, and there is nothing out there. You can just see from one block to the other.

I knew Donal had been in the store and I knew as soon as I had been taken he would call the Police; and I figured if I could just keep on talking, sooner or later the police would spot us; and O'Dell had said to me that it didn't matter if the police spotted us or not, that he had nothing to lose.

He had already been in jail once, that if the police spotted us, he would kill me; and even though ultimately the police would kill him, he would take as many police officers with him as he could; and he kept seeing those police cars and it seemed like I was in there for hours. I kept waiting for the sun to come up.

A little while later somebody rode by the front of the car on a bicycle and O'Dell grabbed the gun and put it to my head and told me not to scream and not to say anything. When the guy on the bicycle rode by, O'Dell put the gun down, and I said, "Look, I'm not trying to hurt you. Just let me go." I said, "There is nobody here. I can't get to a telephone. Just let me go"; and he said, "Well, it doesn't make any difference. Nobody knows you are gone anyway"; and I said, "I don't think that you know that my husband was in the [51] store; and if you were smart, you see the police cars out there? They are looking for you"; and he pulled the gun out again and said, "Are you lying to me?" and I said, "No. As God is my witness, it's the truth; and if you were smart, you wouldn't be sitting here right now. You would be getting away."

He backed the car up and pulled out from behind these buildings, and it's a section of Jacksonville where there is little stores, little warehouse, a few houses here and there; and there is one big road that crosses it and a lot of little ones in back.

He crossed the big road, which is Arlington Road, and went on another side street; and after we were driving down this side street, a police car came this way in the opposite direction; and O'Dell hit the accelerator. We

went through back streets, side streets, we jumped curbs, we drove through people's yards. With every curb we hit, I would hit the dashboard or the ceiling. We crossed Arlington Road again and ended up on another side street by a school.

Again there was nothing there except for the school and some woods, and he stopped the car and told me to get out, and I remember what he had told me, that if the police got after him, he was going to shoot me first; so as soon as I got out of the car, I threw myself on the ground; and he took off in the car; and I don't know why and I don't [52] know how; but I looked up and I got the license plate number; and I started chanting it to myself.

Just before O'Dell had told me to get out of the car, he had told me I was to stand there for ten minutes. He would circle the block and come back; and if I was still standing there, he would drive by and let me alone; but if I wasn't standing there, he would find me and he would get me.

I didn't know where I was. I had no idea. I started walking in the opposite direction on the road, and I saw a set of headlights coming around the corner. I didn't know if it was the police department, if it was O'Dell coming back, who it was.

I flagged the car down, and it turned out it was a man delivering newspapers, and I told him that I had been kidnapped and I needed to get to a phone, and I asked him for a piece of paper and a pencil so I could write down the license plate number because I was still chanting it.

He didn't have a pencil, but he did take me to the closest pay phone. Since I didn't have change, he gave me the money that was required in order to use the pay phone; and I called the store and Don answered; and I told him that I was okay, and this is the license plate number.

Q After that phone call, did there come a time when you saw a police car?

[53] A Yes.

Q What happened then?

A Almost immediately, just as I was hanging up the phone, I spotted a police car; and I went running out of the phone booth flagging him down; and I told him who I was; and he had heard the call and he said, "Get in the car."

I got in the car and I believe his name was Officer Jones, and we started to drive, and he asked me if I had been raped, and I said no, and he said did I need to go to the hospital? I said, "No. I'm okay."

I thought he was going to take me back to the store, but we weren't headed toward the store, and I said, "Well, aren't you going to take me back to Zippy Mart?"

"No. We believe we have caught the man and you need to identify him."

We drove over the Mathews Bridge, which is one of the roads that comes into Arlington, and then took the Haines Street exit and drove for a little while on Haines Street, and I saw all these lights – blue lights, red lights,

whatever – I don't recall, but obviously something had happened.

We pulled up and I – all of a sudden I realized these were all police cars, and the officer told me to sit there for a minute. A little while later another officer came over, an older man; and he told me I needed to get out of [54] the car because I had to identify the man that they had picked up; and I told him no, I wasn't getting out of that police car.

I said I was scared, and he told me that I had nothing to worry about, that there were plenty of other officers there. I got out of the car; and, yes, there were a lot of police officers there; and they had a man, Mr. O'Dell, draped like this with his hands over his head over the roof of a car, and the officer asked me, "Is this the man?" and I said, "I can't tell." I said, "I can't see him."

So the officer brought me closer, and he had the other officer make the man stand up; and that was him, Mr. O'Dell; and the officer asked me –

Q Mrs. Doyle, don't tell us what the officer asked you. That is not necessary.

A All right.

Q Mrs. Doyle, do you see the person in the courtroom that did these things to you eleven years ago?

A Yes, sir, I do.

Q Is there any doubt in your mind?

A None whatsoever.

Q Who is that person?

A That man right there. (Indicating)

MR. TEST: Your Honor, the record should reflect she indicated the defendant.

* * *

[61] Q Did you ever work for Judge Olliff?

A I'm sorry. I didn't hear.

Q Did you ever work for Judge Hudson Olliff?

A No.

Q Did you ever write any letters?

A Yes, I certainly did.

Q Would you tell us who you wrote the letters to.

A I wrote the letter to – I forget the people's name – the interstate compact which I think is called Probation and Parole in Florida.

Q Who else did you write?

A I sent copies of that same letter to – the letter was in 1983. I sent copies of the letter to the prosecuting attorney in the case, who has since gone into private practice, the investigating detective, the presiding judge, who was Hudson Olliff, and the governor of the State of Florida.

Q What was the reason for the letters?

A I had been contacted by Florida Probation and Parole asking what my feelings would be for Mr. O'Dell's parole to be transferred back from Virginia to Florida. I didn't even know he was out of jail. He'd been sentenced

to ninety-nine years, and suddenly in 1983 I find out he is loose again.

No, I didn't want you back in Florida. I have a [62] family.

Q Isn't it a fact that the defendant was sentenced to ninety-nine years, and he wasn't ever supposed to get out again? Isn't that correct?

A That's what I was told.

Q Okay. Isn't it a fact that the Florida Probation and Parole brought the defendant's release date from 2024 to 1982 because they found out you was lying? Isn't that a fact?

A Baloney.

Q Baloney. Well, can you explain, Mrs. Doyle, why the Florida Parole and Probation Commission reduced the charges – reduced the charges and released the defendant in 1982?

A I can't tell you about the workings of the Florida Probation and Parole Commission, but any reduction in charges is news to me.

Q What was the defendant charged with? Tell this jury what the defendant was charged with.

A Kidnapping, armed robbery, and I'm not sure how long the charges were held for attempted sexual battery.

Q Would it surprise you, Mrs. Doyle, that the defendant wasn't charged with armed robbery and wasn't

charged with kidnapping? That they would have been reduced to false imprisonment and robbery, not by gun?

[63] A That is news to me.

Q Well, that happens to be a fact.

MR. TEST: Objection, Your Honor, to him testifying.

THE COURT: Sustained.

BY MR. O'DELL:

Q Now, isn't it a fact that you wrote these letters? I know that you have got to explain to this jury that you are afraid of the defendant because I know you are, because you wrote letters that you were afraid. But isn't it a fact that the reason you're afraid of the defendant is because you lied, because you made up the story to cover the losses in your store that you and Donal, your husband, was stealing?

A I think the courtroom knows which one of us is lying.

Q You think so?

A I do, sir.

MR. RAY: Your Honor –

BY MR. O'DELL:

Q Because I am up here charged with capital murder?

THE COURT: Don't argue with the witness; and [64] please respond to the question, Mrs. Doyle.

THE WITNESS: Would you restate the question, please.

BY MR. O'DELL:

Q Isn't it a fact that you are scared of the defendant? You didn't want him out because you was afraid the defendant was going to get some retribution for you lying to cover up for your losses, the stealings that you and Donal, your husband, did at the store?

A Mr. O'Dell, Yes, I am afraid of the person that you keep referring to as the defendant because eleven years ago I sat in your car and I knew when you were done with me, you would kill me. I knew that then. I know that now, and I will have that knowledge with me till the day I die.

Q If the defendant – Was there a gun found in the defendant's car?

A I don't believe so.

Q Okay.

A However, I do remember the gun quite clearly.

Q Can you explain – can you explain – you say the defendant tried to rape you. I understood you said that awhile ago.

A That's correct.

* * *

[80] THE COURT: Fine. Why don't we just go to lunch now. It makes no difference. Then we can –

MR. RAY: Glad to.

THE COURT: Then you can decide how you will present your evidence.

All right. Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Mr. Test.

MR. TEST: Your Honor, the Commonwealth rests its case in sentencing at this point.

THE COURT: Ladies and gentlemen, we will recess for lunch until five minutes after one. We will proceed with the defense evidence at that time.

Everyone remain seated until the jury clears the courtroom.

(The jury left the courtroom.)

THE COURT: Let me ask the Commonwealth and the defendant one question. I read the Stamper case with respect to probation and parole and the position of the court at that time. I believe it took place prior to the bifurcated effect that we are now dealing with; and, of course, we don't know what the Supreme Court would do now that we have a bifurcated trial.

Is it the Commonwealth's position that it would [81] oppose an instruction that would read something to the effect that under present Virginia law the defendant, due to his criminal record, would be ineligible for parole if sentenced to a life sentence?

MR. TEST: Yes, Your Honor, the Commonwealth would adamantly object to that.

THE COURT: Again, present Virginia law. Because the law could be changed?

MR. TEST: Yes, Your Honor. The reason I'm objecting isn't specifically because of the Stamper case but because there is an instruction which has been approved in Stamper and other cases which states the jury is not to consider what may happen after their deliberation.

THE COURT: That's true.

MR. TEST: So based on that – and I'll be glad to read through the cases again and tell the Court my thoughts on it again after lunch; but as you know, I still oppose it.

THE COURT: Yeah. I believe it is after the change in the law. I am just not sure what the Court would do with it.

MR. O'DELL: We would, of course, ask that it be given, Your Honor.

THE COURT: I understand that. We will discuss [82] it before we start again.

MR. RAY: Yes, sir.

MR. O'DELL: Yes, sir.

THE COURT: All right. Court stands in recess.

THE BAILIFF: All rise, please.

(The trial recessed at 12:08 p.m. At 1:17 p.m. the trial continued as follows out of the presence of the jury:)

THE BAILIFF: Order in the court. Remain seated, please.

MR. RAY: Your Honor, we – Mr. Collins and I – discussed with Mr. O'Dell the presence of those witnesses that he gave us this morning; and he has informed us that he waives their presence; and, second, I asked him if he would like me to return to my home and get the Florida prison records that I have; and he – he waived that; and if I misunderstood Mr. O'Dell, he should set it on the record.

MR. O'DELL: Your Honor, in reference to the witnesses, they are having problems locating them, et cetera; and they are not that important at this point.

Insofar as the record goes for Mr. Ray having to return to his home, I felt like that at this point it wasn't really that important either. In view of everything else in this case, that would be a minute [83] point.

However, the Commonwealth was in error on those charges – on the Florida case and the Virginia case.

THE COURT: Now is the time to correct it, Mr. O'Dell.

(Pause)

MR. O'DELL: Well, Your Honor, I would like to reserve that point, and I will get certified copies from Duval County and from Norfolk.

THE COURT: How are you going to reserve the point?

MR. O'DELL: Well, evidently I can't get certified copies now. Mr. Ray has copies now at his home, but they are not certified. They are copies of my prison record in Florida.

THE COURT: Who knows? I might let them in for what they are worth.

MR. RAY: I will be glad to go home, but it takes me between twenty-five and thirty minutes one way.

THE COURT: I'm aware of the problem.

MR. RAY: I will be glad to, Your Honor. Whatever Mr. O'Dell wants to do.

THE COURT: Can Mr. Collins locate them?

MR. RAY: No, sir. I have got three dogs, and I [84] don't think Mr. Collins would make it out there.

MR. O'DELL: Well, Your Honor, I am going to just go ahead and waive that point.

THE COURT: You are going to waive it anyway?

MR. O'DELL: I am going to waive it.

MR. RAY: Be sure.

MR. O'DELL: I will waive it.

THE COURT: All right.

MR. O'DELL: Because I don't think it – I don't think it would prejudice the jury more than what they are already prejudiced.

THE COURT: Mr. O'Dell, I don't know whether you are going to take the stand or not; but assuming you do, I have allowed you to remain in the courtroom without any restraints; and the deputy will be standing in the jury doorway while you are in the witness box.

MR. O'DELL: Okay. I don't have no problem with that.

THE COURT: All right. Anything else?

MR. TEST: Your Honor, I just would like to bring this point up now. I have reread Stamper over lunch and the companion case which is referred to in Stamper, and that is *Hinton v. Commonwealth*, 219 Va. 492, and on the point in Stamper regarding whether the Court may properly or not properly inform the jury [85] regarding eligibility for parole or probation, the Stamper case revolved around the case where the jury came back after an hour, hour and half, and had a question, and the Court stated that the proper response – the Supreme Court said the proper response of the trial court is to inform the jury that whatever may happen after sentencing is not their concern; they are to fix punishment as they see fit.

The Stamper case referred to the Hinton case, and if the Court has not read it, I think it may be important for the Court to do so before it rules. In the Hinton case the set of facts were somewhat similar. It was a case of malicious wounding, and the jury was out and came back with a question on the same issue and the Court instructed them that it could not really tell them anything other than – because it was restricted by the rules of the Supreme Court on the subject and it cited a long line of cases, but then the Court proceeded to tell them that there was an administrative arm of the government that controlled probation and parole and it was separate and apart from the courts and not for them to consider; but it mentioned words parole, good behavior, eligibility, some

people don't serve all their sentences, that variety of things.

It goes on a page and a half; and as I was [86] reading it, I thought possibly the Court could say something along those lines to the jury if the question came up; but then it hit me like a bolt of thunder that it was a complete reversal in the case because it was entirely prejudicial to the defendant.

The scenario was the jury came out and asked the question. When the judge had gone into the possibilities, the jury returned – deliberated and came back with the maximum punishment, and apparently the Supreme Court felt that the Court's overall questioning may have influenced that jury to think there was the possibility of parole and therefore changed that individual juror's mind to the maximum punishment, so I think we are somewhat bound by the long line of cases, Hinton and Stamper, that say the Court is precisely to say only the instruction that if they find the accused guilty, they must impose such punishment within the limits fixed by law as appear to be just and proper and that what might happen afterwards is of no concern.

I bring that up on the issue not only of probation and parole but also regarding the Virginia code section that now refers to third-time offenders of violent crimes – murder, rape, and robbery – are not eligible for parole.

[87] We are basically faced with the same situation; and although that issue has not been addressed in these cases, it is again an administrative function of the parole board to invoke that section and turn down a defendant's request for parole; and I think we would be faced with

the same situation if the defendant asked for an instruction such as that.

The final point that may come up in this that I can possibly envision is that the defendant either in testimony or in argument makes some reference to it. If he does such, I will simply ask – I will object to it on the record and ask that the jury be instructed to disregard it.

THE COURT: All right.

MR. RAY: Well, Your Honor, we are willing to risk whatever the Supreme Court of Virginia might say as far as the instruction that this particular defendant faces life without parole. After all, the reason you are faced with the issue is that Mr. Test has introduced fourteen felonies against this particular defendant.

I think the statute is applicable. I think he does face life without parole. I don't think there is any question that's what it means, and for the jury to be fully informed of what the alternatives are, they [88] should be informed that it is in fact life without parole; and that's our basic premise; and Mr. O'Dell agrees with this; and I think the cases are applicable that the Court should be fully informed, that it doesn't mean life or it doesn't mean eleven years.

It means life without parole; and we intend to address it on examination if Mr. O'Dell decides to take the stand; and we respectfully ask the Court to inform the jury, as they should be informed, of this problem.

(Pause)

THE COURT: The instruction will be denied based on the present law and any precedent, and your exception is noted.

All right. Everybody ready to proceed?

MR. RAY: Yes, sir.

THE COURT: Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

MR. RAY: Anita Fridley.

THE CLERK: Ma'am, can you raise your right hand, please?

(Mrs. Fridley was sworn.)

* * *

[107] *JOSEPH ROGER O'DELL III*, the defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAY:

Q Would you state your name for the record, sir.

A Joseph Roger O'Dell III.

Q And it is your decision, your own decision, to take the stand and testify under sworn testimony and to waive all your rights, privileges, under the Constitution of the United States?

A Yes, sir. That's correct.

Q All right, sir. Sir, where were you born?

A Roanoke, Virginia.

Q And your mother – What was her name?

A Ellen.

Q Is she living now, sir?

A No, sir. She died July last year.

Q She died while you were in prison?

A While I was in jail.

Q In jail. And your father, sir – What was his name?

A Joseph Roger O'Dell, Jr.

[108] Q And when your mother died, were your father and mother married?

A No, sir. They were divorced.

Q And how old were you when they were divorced?

A I was sixteen years old.

Q Sixteen years old. And what was the occupation of your father?

A My father was in the Navy.

Q And did he eventually retire from the Navy?

A After thirty-four years. Yes, sir.

Q All right. And – and in the Tidewater area, sir, where have you lived?

A I have lived in Norfolk.

Q All right, sir. And how far have you gone in school?

A I finished high school, and I have got college equivalency, four years.

Q All right. And how old were you when you went into prison, sir?

A I was sixteen years old.

Q Sixteen. And what prison did you go into?

A Virginia State Penitentiary.

Q Where is that, sir?

A Richmond, Virginia.

Q And were you segregated from the adult [109] population or were you put in with the adults?

A I was put in with the adults.

Q All right, sir. And this GED, sir – where was that? In prison or on the outside?

A In prison.

Q All right, sir. And how many years have you spent in prison, sir, out of your adult life?

A Twenty-two years.

Q Now, the first two offenses, sir, that were talked about were – the first one was grand larceny, sir.

A That's correct.

Q What year was that? 1950?

A 1957. Got convicted in 1958.

Q And what grade were you in high school?

A I was in the tenth grade at Granby High School.

Q Granby High School. And how long did you stay in prison from that first offense, sir?

A Stayed in prison for three years, and I tried to run one time. My father beat my mother, and I got shot in the head.

Q Do you have those scars today?

A I got the bullet wound in my head. Yes, sir.

Q All right, sir. And the second offense is unauthorized use, motor vehicle, and I believe armed robbery?

A Yes, sir. That happened in 1961. I was [110] nineteen.

Q Nineteen. And you were let out of prison after how many years the first time?

A After twelve years and seven months.

Q All right, sir. Now, You have got a conviction for Murder 2 –

A Yes, sir.

Q – which you were sentenced to twenty years in Goochland County I believe in 1965?

A Yes, sir. That's correct.

Q Now, did that – did that murder happen when you were in civilian life or did that murder happen in prison?

A It happened in prison after I was attacked by a homosexual.

Q All right, sir. And, sir, did you practice homosexuality in prison?

A No, sir, I didn't.

Q And why would a homosexual attack you, sir?

A Because I was young boy.

Q How old were you?

A I was twenty-three at the time.

Q And where was this, sir?

A This was at Virginia State Farm, Goochland County. This man's name was Lloyd Best, and he was a known homosexual, and he also attacked young boys in prison. He was [111] well known. The man attacked me with a knife. I disarmed the man. I walked away from the man, and the guards at the prison testified to this – that the man pulled another knife on me, and I hit him with a chair and disarmed him again.

He pulled another knife out, the third knife; and at that time I stabbed him with his own knife. He lived for nineteen days, and he died from the pneumonia. He didn't die from the stab wounds, but I was convicted.

Q But you did stab him, didn't you?

A Yes, sir, I stabbed him.

Q And as a result of the stabs and the pneumonia, he died?

A He died nineteen days later.

Q And you were charged and you were convicted, weren't you?

A I was charged with second degree murder.

Q All right, sir. When were you released from prison, sir, under that?

A I was released January the 22nd, 1974.

Q 1974, sir. And where did you go from there?

A I went to Jacksonville, Florida.

Q Why did you go to Jacksonville, Florida?

A That's where my mother and father or stepfather resided.

Q All right, sir. And were you employed in [112] Jacksonville?

A Yes, sir. I was employed with Montgomery Industries International.

Q What kind of work was that?

A Well, I was in charge of the whole machine shop where we manufactured blow hogs, and I had to supervise the blueprints and make sure that all the setups were correct, and I checked quality control, and I fixed the computer sheets because everything was computerized.

Q Sir, when you been on – in civilian life, have you ever been unemployed? Have you always had a job?

A Always had a job. Momentarily I been unemployed but not for the most part.

Q When you were in Norfolk living with Connie Craig, did you have employment prior to the arrest on the charges of the murder of Helen Schartner?

A Yes, sir, I was working at the time.

Q And where were you working?

A I was working at General Foam and Plastics as a machinist and a bowl maker.

Q All right, sir. And what were you paid a week?

A It varied. Most of the time I made $500 a week. Sometimes I made $600, and at times I made as high as $800 a week.

Q All right, sir. Now, sir, have you ever been [113] married?

A Yes, sir. I have.

Q And are you married now?

A Yes, sir.

Q And who are you married to?

A My wife's name is Kathleen O'Dell.

Q All right. And where does she live?

A In Rhinebeck, New York.

Q All right, sir. And do you have any children of that marriage?

A I have one boy four years old.

Q And what is his name?

A His name is Paul – Paul O'Dell.

Q And does he have any medical problems?

A He has leukemia.

Q All right, sir. Now, you were sentenced to ninety-nine years –

A Yes, sir.

Q – for the armed robbery and kidnapping of Mrs. Doyle, sir?

A That's correct.

Q And how long did you stay in prison?

A I stayed in prison seven years.

Q Seven years. And is that because the system doesn't work or because you in fact had ninety-nine years or [114] why did they let you out early, sir?

A In Florida a ninety-nine-year sentence tells the parole board that they do not want you out. You have to do thirty-three and a third years to make parole. I was released after seven years because Donna Doyle – they found out Donna Doyle and her husband had lied. They dropped my release date from 2024 to 1982, and I was released August the 3rd, 1982.

Q All right, sir. Now, did you ever work for any law enforcement agencies?

A Yes, sir. I did.

Q And when was that, sir?

A In 1981, 1982.

Q And where was that?

A In Florida.

Q And what was the purpose of that, sir?

A Well, I was working for the Ranger Division at one time, the Florida Rangers. I wasn't a law enforcement Ranger because of my record. I was a park ranger with the Rangers, and my job was I patrolled the perimeters of the reservation and took care of the college campus, and I made sure there was no poachers on the alligators.

Q And this was after you were released?

A During my incarceration also.

Q All right, sir. Have you ever worked for any other law enforcement agency?

[115] A Not officially. I worked with the Florida parks law enforcement. I worked with Ronnie Cornelius, Jerry Peters, and Dalton Bray in drugs, drug implementation from Cuba and various other places.

Q Sir, why didn't you testify in your case in chief?

A The reason I didn't testify is because if I would have took the stand during my trial, I would have had to reveal to the jury that I had a past record, and my record was so bad, had I told – gotten on the stand and told you all what had happened, that I – that just by my record alone, I would have been found guilty, and that's the reason.

Q Now, sir, how old were you in 1983, 1984?

A In 1983 I was forty-one.

Q Forty-one years old?

A Yes, sir.

Q Why – Why did you ever go to live with Connie Craig, who was sixty-three or sixty-four then?

A I was forced to live with Connie Craig by the parole board.

Q When you mean forced – I don't know. From my perspective, it's pretty hard to be forced to live with a woman. Why – What were the circumstances of that?

A My wife – my wife and baby – my baby was seven months old in 1982, and I had to come back to Virginia to get [116] a parole violation that had happened in 1975 resolved, and my wife and baby were living in Lake City, Florida; and she was on welfare because of me being sent back to Virginia.

Q Yes, sir.

A And during the time while I was gone, a friend of mine – so-called friend of mine had told my wife that they had put me back in prison and that I was never going to get out, so my wife left and went off with him.

Well, my sister worked for the Navy, and through her computer she found out that my wife and baby were living in a place called East Palatka, Florida; so I asked the parole board if I could take a flight to Florida to see my wife and baby.

Q Virginia parole board?

A Yes, sir. And the Virginia parole board told me if I went to my wife and baby, that they would revoke my parole, so my sister and I flew to Jacksonville, Florida; and my mother bought me a car. She gave me a car, and my sister took the car and went to East Palatka, Florida; and she found my baby and my wife living in a shack; and my wife give her all my personal belongings and clothes and so forth and she couldn't believe, you know, that she had been lied to, you know, about me not getting out.

She said is Joe really in Jacksonville? And my sister said yes, so the parole board sent me back to Virginia . . .

* * *

[133] A I did on March the 21st, 1985.

Q Did he need a search warrant for that?

A He needed one but he didn't have one. I gave it to him voluntarily.

Q You consented?

A Yes.

Q Now, you have been convicted of a number of felonies, and if – if you are sentenced to life, does that mean life with parole?

MR. TEST: Objection, Your Honor. We been over this ground. Mr. Ray knows perfectly well it's not an appropriate discussion.

MR. RAY: We haven't discussed that, Your Honor and I think it's perfectly proper. We just discussed instructions.

MR. TEST: Your Honor, the ruling applies to testimony and Mr. Ray knows that very well.

A Well, I will tell you something.

THE COURT: I will sustain the objection.

A I'm not worried about that, Mr. Ray. I just want – look, whatever they bring back is okay. I just want the truth to be known about why I didn't testify and what happened that night. Okay.

[134] BY MR. RAY:

Q Now, you –

A Let me finish explaining some things to the jury, Mr. Ray.

Q All right, sir.

A Now, Connie Craig says that I said that I vomited the blood on my clothes. That was one time she told the truth. That is one time she told the truth, and I also told the police that – that I had vomited blood on my clothes, and I told the police why I said that I vomited on my clothes. Because of Connie Craig telling my parole officer, Jack Pollard, that I had been fighting at Ocean View. I had been given a direct order by the parole board that I was not to go to Ocean View for anything; and if she had told the parole board about that, I would be in jail and sent back to prison to serve sixteen more years; so rather than to go to prison for sixteen more years, I told a lie. I said I vomited blood on my clothes.

Q Sir, because of this conviction, how many – how many years do you have pending that you owe the state?

A Without this conviction, I got to do sixteen flat years before I will ever get out. That's because I got a Parole violation.

Q Even without this conviction?

A Even without this conviction. It's just like [135] this –

Q How old – How old are you now?

A I am forty-five – will be forty-five on September 20th. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

MR. TEST: Judge, I am going to object and ask that the remarks be stricken from the record and the jury asked to disregard those with regard to the Virginia prison system and parole and so forth.

THE WITNESS: I haven't said anything about parole.

THE COURT: I don't think he said anything about it, Mr. Test.

BY MR. RAY:

Q All right, sir. Sir, we – let me ask you about – what was your life like with your father? Would you care to tell the Court?

A Well, I am not going to try to make any excuses about being an abused child or to gain sympathy, but I was treated very bad.

[136] Q Did you deserve it or –

A Well, I guess I was like most little boys. I was always in trouble, you know. I do mischievous things like any other boy.

Q When you were administered corporal punishment, how did he do it?

A In various ways. He would beat me in the head or kick me. Sometimes he was good to me. Just various ways.

Q Do you still love your father, sir?

A Oh, yeah.

Q Is there anything else you would like to tell them?

A Well, I just want the jury to know this. I am saying I am not guilty; and I know you have already found me guilty; and as I said previously, I would have found myself guilty had I not – if I had been on that jury, I would have found me guilty too with what you people knew and what they hid from you. I would have done the same thing, and I want you to know that I think you are still a good jury, that you brought back a verdict that nobody else would have brought back any different with the evidence that was put before you; but you was lied to; and I hope I get a chance today to show you some more things that I can't say from the stand that was hid from you also.

* * *

[172] (The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Ladies and gentlemen, listen to the instructions that are appropriate and closing arguments from the Commonwealth and the defense in the sentencing phase. I will read the instructions to you at this time.

Instruction Number 1. You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed of death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives.

Number 1. That after consideration of his history and background there is a probability that he [173] would commit criminal acts of violence that would constitute a continuing serious threat to society; or, Number 2, that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death; or if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment in the penitentiary.

If the Commonwealth has failed to prove beyond a reasonable doubt either alternative, then you shall fix the punishment of the defendant at life imprisonment.

Instruction Number 2. The Court instructs the jury that aggravated battery means a battery that qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

Instruction Number 3. The Court instructs the jury that in reaching your decision on the question of punishment, you are to weigh the evidence in aggravation and mitigation, but you are cautioned that [174] you are not to be influenced by any passion, prejudice, or any other arbitrary factor.

Instruction Number 4. The Court instructs the jury that you need not find any mitigating circumstances in order to return a sentence of life imprisonment. Although you may find one or more aggravating circumstances and no mitigating circumstances, you as a jury still always have the right to exercise mercy and sentence the defendant to life in prison.

Mr. Test.

MR. TEST: May it please the Court, ladies and gentlemen of the jury, again I thank you for your patience and for your attentiveness.

We all knew a month ago that it was possible we would reach this point; so now when I speak to you, I speak to you collectively as though you are one person because what we ask now is that again you react, think, talk, and work collectively for one decision. I do not mean to indicate to you that you are not in fact twelve

separate individual minds, for you are; but you are the collective conscience today of this community; and as such, you must act as a collective reasoning conscience.

I further speak to you on behalf of the office [175] of the Commonwealth's Attorney in this city because it is that office that is the duly appointed representative to represent the citizens of this community in a case such as this; and, ladies and gentlemen, I ask you to do something today that is totally against the grain of someone who is a living, breathing human being.

I ask that you sentence this man to death. It is not something that I do lightly, and it is certainly not something that I expect you would think of or take lightly.

If I may have the instructions, Your Honor.

Thank you. This is the only one I need, Your Honor.

The instruction that the Court just now read to you details what the law is for a sentencing hearing such as this. It tells you that the Commonwealth in a sentencing hearing still must prove to you the same legal standard beyond a reasonable doubt, one of two possible things; and I submit to you ladies and gentlemen right now we have proved beyond any doubt both of them.

The first one is the issue of whether or not this crime as it was committed was so horrible, inhuman, outrageously wanton or vile such as it [176] involved an aggravated battery to this victim, Helen Schartner, beyond the minimum necessary to accomplish the act of murder.

Aggravated battery is defined to you as battery that quantitatively and qualitatively is more culpable than the minimum necessary to accomplish the act of murder.

I need not and I will not again show you those photographs. I think I need not and I will not reiterate again Doctor Presswalla's testimony, for it is abundantly clear and it is uncontradicted how she died.

She was strangled to death with such force and violence by this man's human hand that he left his fingerprints in her neck; and she was beaten so wantonly about the head that there are eight separate and distinct marks besides those across her hands and arms.

Those beatings and those marks are the aggravated battery in this case that is not necessary to accomplish a murder but were necessary under those circumstances for this defendant to accomplish the acts he intended.

On that issue and that issue alone there is enough for you to sentence this defendant to death – [177] because that issue was proved beyond a reasonable doubt.

The other issue is the issue of the defendant's future dangerousness. The Court's instruction on that point is that after you consider his history and his background, there is a probability that he would commit criminal acts of violence and that those criminal acts of violence would constitute a continuing threat to society.

Note the word in there is "probability". No one can predict the future. You need only find that it is probable that it can happen.

These are merely pieces of paper, ladies and gentlemen; but the weight of this evidence is overwhelming. The defendant himself has told you since he was fifteen, except for a sparse three or four years, he has lived behind bars. That has not been enough to prevent the continual mounting of this criminal history. You will

recall that someone in this case who testified to you was referred to as a career criminal.

I submit to you ladies and gentlemen if there is a career criminal, it is Joseph Roger O'Dell for he knows nothing else other than violating the laws of this country. Not only in the State of Virginia but in [178] another state as well; and it is interesting, is it not, that there is a graduation of the seriousness of the offenses from use of a car to a robbery to a murder to an abduction and another robbery and now to another murder?

Isn't it interesting that he is only able to be outside of the prison system for a matter of months to a year and a half before something has happened again?

You have heard Donna Doyle's story. I need not point out the incredible similarities between her and what this case showed happened to Helen Schartner. From the time of day, to the day of the week, to the weather conditions, to the month of the year. I submit to you that what you were listening to was a very close recitation of what Helen could have told us.

We have proved beyond a reasonable doubt that it is probable that this man again will commit some criminal act of violence because all of his criminal acts that he now commits involve violence. Fortunately for Donna Doyle and her family, fortuitous circumstances intervened.

Her husband called the police. The police cars were going back and forth. She was released or [179] escaped, and she survived.

No such fortuitous circumstances intervened for Helen Schartner on that cold rainy night. She died, and

whatever words she stated were last heard by this man. She died in his grasp.

Ladies and gentlemen, I do not ask you to do an easy thing; but I state to you that this man, Joseph Roger O'Dell, has forfeited all right to life within this society as any kind of free human being. Our society is one founded on justice and freedom for everybody.

You have witnessed that this man has been provided by our society every opportunity for a fair and just trial. He has had his right to talk to you. He has had his right to confront witnesses. He has had his right to counsel. He has had his day in court, none of which Helen Schartner had.

Thank you, ladies and gentlemen.

Mr. O'Dell.

MR. O'DELL: You know what it feels like to sit at a table and hear somebody say those things about you? Can you imagine? For twenty months I laid in jail watching my mother die because of this charge. I had laid over there in jail and thought about this case and thought about this case, did everything I could to [180] bring the truth to light.

Now, Mr. Test talks about criminal justice system. He tells You about all the things that I have done in my past. well, ladies and gentlemen, that's all I have heard all my life, how bad I was.

He never told you about any of the good things I did – because it don't look like I did any good things, but I did. I have done some good things; but, ladies and gentlemen, I am not on trial for something I have already

served time in prison for. I paid for that dearly with years and years and years of my life.

Today that's all I have heard is what I did in the past, and I heard about a crime. That's all I heard for twenty months, that I killed this lady.

Now, he tells you that he wants you to bring back a verdict, to sentence me to death. If you recall in my opening statement, I told you I thought this was an atrocious crime; and if you thought in your hearts that I did this crime and you feel that I deserve to die, then I ask you to bring back that verdict; but I ask you to bring back that verdict after I read this – these things here that I have got written down that hasn't been told to you and things that I told you awhile ago that I was going to tell you.

Mr. Test – well, let me ask you this. Would [181] you believe a liar? If I proved to you someone lied and you know they lied, are you going to believe anything they said?

Mr. Test told you when he first come up here and made his opening statement – he said I will prove to you those tire tracks were the defendant's. What did the expert say?

He told you that he would prove to you that the cigarette butt that was found on the trail was the defendant's. What did the expert say?

He told you that he would prove those foot tracks. They never was proven.

Now, ladies and gentlemen, there is a whole lot of other things that has been brought up; and I think if they had been brought up and the truth told to you, that you

wouldn't have come back with a guilty verdict; and as I told you before, I think you are a good jury. I just think you been misled.

* * *

[201] MR. TEST: Ladies and gentlemen, I am very conscious of the hour, so my comments will be very brief. I would note to you the comment of Defendant O'Dell. As he pointed and referred to his past and his criminal record, he said to you, "I may be a bad person with a bad past, but I am not the type of man who would take out and murder this defenseless woman."

I submit to you that sitting there in the form of Mrs. Donna Doyle is someone who lived to tell the tale that Helen Schartner could not and flies directly in the face of what this man just told you.

The defendant spoke to you from this witness stand of his education and what degrees he could get, [202] what his learning has been. I will submit to you that in ten years or eleven years he has learned one thing very well. You do not leave your victim alive to point at you.

The defendant, standing here where I am, asked Mrs. Doyle, "Why didn't I kill you?" What an odd question. I submit to you it's because she prayed so hard and so honestly that her prayer was answered, but the same miracle did not occur for Helen Schartner.

His words, "We are not a society of blood-seeking ghouls," I will agree with. We are a society of fair, honest people who believe in our government and who believe in our justice system; and I submit to you there was a failure in the Florida criminal justice system for paroling this man when they did.

I do not ask you to sentence him to death out of vengeance. Nothing can bring back Helen. That is pointless.

But I submit to you, as I told you once before, this defendant is a night person. This defendant is not only a night person and a convicted murderer. Ladies and gentlemen, he is a night stalker because he is comfortable at night when under the cloak of darkness and in whether conditions that are fitting to him, he can take advantage of moments of opportunity [203] and prey on defenseless women – because that is what he gets off on.

Violence. This man is so full of violence and hatred that he finds the expression for it in winter months when most people are indoors, late night hours when he can go out among those few who are unfortunate enough to be there and pick a victim.

His motive for these crimes is not sex. There is no sexual motive involved. Rape and sodomy are crimes of violence and violence only – because it is violence that this man expresses his personality in. Sex is secondary. It is sexual only because he preys on women.

Your Honor, the instructions.

There is no mistake. The instruction tells you even if you find I have proved to you beyond any reasonable doubt both sentencing alternatives, which I have, you may fix his punishment at death. It is not mandatory, and it should not be, for no one should tell you that you have to vote one way or the other.

You may find that there has been no mitigating evidence – and I submit to you the mitigating evidence

offered amounts to nothing; but you may still sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in [204] its criminal justice system and its government, what does this mean?

You have been here for a month and watched it function. What does it mean that we place our trust in our government and in our officials to defend us against foreign nations and to uphold our laws? What does it mean if we don't trust in them and believe that they stand for truth and justice and what is right?

I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.

Thank you, Your Honor.

THE COURT: Soon you will be retiring to your jury room to deliberate. You have previously elected a foreman, so I presume the present one will continue.

The first instruction which I read to you has been reiterated by the Commonwealth is that in order for you to find the defendant – not to find but to recommend the punishment, fix the punishment at death, you must find one of two things as having been done. [205] You can find both or you can find either of the two. So technically you have before you four possible verdicts. You have three verdict slips. Two of them read as follows.

We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to rape, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

If you find that he is a continuing threat to society, the foreman would execute this particular verdict slip and date the same.

In addition, you are considering the following. We, the jury, on the issue joined, having found the defendant guilty of willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to, rape, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the [206] victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

If you find that finding, the foreman is to sign that and date it. In other words, the two verdict slips I read to you concerning the punishment of death, either one or both may be executed by the foreman depending upon your findings.

The third – and that gives you three of the possible verdicts. Double or single or either one of the other.

The fourth possible verdict is we, the jury, on the issue joined, having found the defendant guilty of willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to, rape, and having considered all the evidence in aggravation and mitigation of that offense, fix his punishment at imprisonment for life.

That is the fourth verdict. Only those that are applicable should be executed. The foreman will execute each one and date them.

We will give you the instructions which were read to you, and we will give you the verdict slips. You are now to retire to the jury room and consider [207] your verdict. If you will retire to the jury room.

(The jury retired to consider its verdict at 5:30 p.m.)

THE COURT: Escort the defendant out, please.

Court will stand in recess until the jury returns a verdict.

THE BAILIFF: All rise, please.

(The trial recessed at 5:32 p.m. At 6:42 p.m. the jury indicated they had arrived at verdict.)

THE BAILIFF: Order in the court. Remain seated, please.

THE COURT: Remind everyone in court again. The Court will not tolerate any outbursts or displays of anything. The courtroom will be immediately cleared if such action occurs.

Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE CLERK: Members of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: Let me have the jury verdict, please, Mr. Bailiff.

MR. RAY: Stand up.

(The defendant complied.)

[208] THE CLERK: We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate, and premeditated killing of Helen C. Schartner, during the commission of, or subsequent to rape, and having unanimously found after consideration of his history and background there is a probability that he would commit criminal acts of violence that would constitute a continuous serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death; and we, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Helen C. Schartner, during the commission of, or subsequent to rape, and having unanimously found that his conduct in committing the offense was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Members of the jury, are these your verdicts?

JURORS: Yes, they are.

MR. RAY: Poll them. Poll them.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

November 13, 1986

* * *

[105] MR. O'DELL: The next point is about the parole. The defendant was not allowed to tell the jury that he would never be allowed parole; and if it's my –

THE COURT: I told you then – correct me if I'm wrong, Mr. Test. There is a case involved that absolutely prohibits the Court from doing such.

MR. O'DELL: That's for the defendant's protection, isn't it, Your Honor?

MR. TEST: That's correct, Your Honor; and quite frankly, when Mr. O'Dell was on the witness stand during the sentencing hearing, he asked him the question anyway, and he answered it anyway. They were told in spite of the Court's instructions.

THE COURT: The law may not be right, but that's the law, Mr. O'Dell.

MR. O'DELL: Your Honor, one of my exhibits is the misconception of jurors on parole.

THE COURT: I think you have a very valid point, but you have a problem which you ought to appreciate. Under present law, you are not eligible for parole. That's a fact, and we all know it.

On the other hand, if the law gets changed, you very well could be. So therefore, it's hard to tell a jury that you're not eligible for parole unless you go [106] to the next step and say under the present law; and naturally, as

the defendant, you would not want that revealed to the jury.

MR. O'DELL: Your Honor, I haven't said a thing during the course of these proceedings, but I hope that my exceptions have been noted to each one of your rulings.

THE COURT: I surely hope so.

MR. O'DELL: Yes, sir. Number 31 on Page 78, Your Honor –

THE COURT: All right.

MR. O'DELL: The defendant was not allowed to explain anything about the abduction charge being dropped for lack of evidence. Mr. Test continually led the jurors to believe that even though the charge may have been dropped, that the thing actually happened.

He also, as I've already said, kept talking about the gun being stuck in her ribs, and that his hypothesis is how it happened; yet I wasn't allowed to explain to the jury that if the lady had been abducted, how could she have been forcibly put in my car and carried across the street as Mr. Test's hypothesis said?

* * *

Supreme Court of Virginia.

Joseph Roger O'DELL

v.

COMMONWEALTH of Virginia.

Record Nos. 861219, 870157.

Jan. 15, 1988.

WHITING, Justice.

Joseph Roger O'Dell, III[1] was indicted and tried before a jury for the capital murder of Helen C. Schartner in the commission of, or subsequent to, rape, Code § 18.2-31(e), as well as for her abduction, rape, and sodomy by force. The trial court granted O'Dell's motion to strike the evidence on the abduction charge. The jury convicted O'Dell on all the remaining counts, and fixed his punishment at 40 years each on the rape and sodomy charges. In the second phase of the bifurcated trial, the jury heard evidence of aggravating and mitigating circumstances and fixed O'Dell's sentence at death, based on his future dangerousness. The trial court imposed the death sentence after a hearing required by Code § 19.2-264.5. Overruling O'Dell's motions to set aside the verdicts, the trial court entered judgments on all three verdicts.

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[1] O'Dell is identified as Joseph Roger O'Dell in virtually all of the documents filed in this case, but the record shows that the indictments were amended without objection to show his name as Joseph Roger O'Dell, III.

We have consolidated the automatic review of O'Dell's death sentence with his appeal from the conviction of capital murder, Code §§ 17-110.1(A), -110.1(F), and given this case priority on our docket, Code § 17-110.2. We also certified O'Dell's appeals of the other two convictions from the Court of Appeals for consolidation with the capital murder appeal. Code § 17-116.06.

O'Dell elected to act as his own counsel, but the trial court appointed standby counsel to aid in his defense. Because O'Dell actively represented himself in substantial portions of the pretrial proceedings and at trial, his appellate counsel suggested in oral argument that we should not require compliance with our contemporaneous objection rule, Rule 5:25. We reject this suggestion. For the reasons enunciated in *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987), another capital murder case in which the defendant proceeded *pro se*, we will not consider the merits of those matters to which O'Dell failed to make the proper Rule 5:25 objection at trial. Those matters are the following:

1. The Commonwealth's Attorney's attendance at hearings in which O'Dell attempted to establish his need for experts to be paid by the Commonwealth.

2. O'Dell's later failure to request a ruling on his motion for a change of venue. The motion was made before the venire was examined, the trial court deferred a ruling on the motion, and thereafter O'Dell never requested a ruling.

3. The trial court's alleged failure to "adequately channel the jury's discretion."

4. Venireman Kelly's retention.

5. Venireman Thornton's exclusion.

6. The trial court's failure to sequester the jury.

7. Alleged misstatements of the law "concerning the consequence of the jury's failure to agree on sentence" and the refusal of an instruction on that issue.

8. The admission of evidence indicating a Bible was the only article not stolen from Christianson's car.

9. The exclusion of evidence that Steven Watson was on probation in Virginia when O'Dell made his admission to Watson and when Watson contacted the Commonwealth's Attorney.

10. Restriction of O'Dell's cross-examination of Dr. Sensabaugh.

Additionally, we will not consider a different ground of objection raised for the first time on appeal, Rule 5:25; *see Jones v. Commonwealth*, 230 Va. 14, 18 n. 1, 334 S.E.2d 536, 539 n. 1 (1985), on the following matters:

1. Venireman Villandre's retention. At trial, O'Dell's objection to Villandre's retention as a juror was that he was a former military judge, *not* that Villandre was unable to accord O'Dell his constitutional rights.

2. O'Dell's objection to the admission of evidence of the theft of Christianson's clothing on the ground that it was immaterial.

3. O'Dell's objection that Steven Watson's testimony was more prejudicial than probative.

4. O'Dell's objection to the inclusion of the word "shall" in Instruction 17.

5. O'Dell's constitutional objections to the admission of hearsay statements in the probation officer's report.

Furthermore, pursuant to Rule 5:27(e), we will not consider the following assignments of error which were not argued on brief: X, XIV, XV, XVIII(b), (e)(f), (g) and (h), XXIII, and XXXI.

I

FACTS

The Commonwealth prevailed before the jury. Therefore, in conformity with familiar appellate principles, we consider the facts in the light most favorable to the Commonwealth.

On Tuesday, February 5, 1985, the victim, Helen Schartner, left a night club in Virginia Beach known as the County Line Lounge about 11:30 p.m. O'Dell left the same club sometime between 11:30 p.m. and 11:45 p.m. The next day, February 6, 1985, Schartner's car was found in the parking lot of the County Line Lounge. Near 3:00 p.m. the same day, Schartner's body was discovered among the reeds in a field near a muddy area behind another club, across the highway from the County Line Lounge. Tracks from tires consistent with the tires on O'Dell's car were discovered in an area near Schartner's body.

Schartner had been killed by manual strangulation. She also had eight separate wounds on her head caused by blows from a handgun equipped with a cylinder. These head wounds produced extensive bleeding. A

handgun with a cylinder was seen in O'Dell's car about 10 days prior to the murder.

Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face and hands, in his hair, and down the front of his clothes.

Vaginal and anal swabs disclosed the presence of seminal fluid in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid.

O'Dell had been living in the home of a woman friend, Connie Craig. Approximately a week before the murder, Craig ordered O'Dell from the premises. O'Dell called Craig about 7:00 a.m. on Wednesday, the morning after the murder, said that he had vomited blood all over his clothes,[2] and stated that he wanted to talk with her before he left for Florida.

When O'Dell reached Craig's house at about 7:30 a.m., he said he wanted to sleep, and he slept until 9:30 or 10:00 o'clock that evening. When O'Dell awakened, he asked Craig how to remove the blood from his new blue-gray jacket.

The next day, Thursday, about 1:00 p.m., O'Dell called Craig from his place of work and told her he had put his clothes in her garage, but he intended to take them out the following day. After the telephone conversation, Craig read the local newspaper's account of the

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[2] In an alibi inconsistent with the one he had given to Craig, O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5.

murder of Schartner. The account said the victim had last been seen at the County Line Lounge. When Craig remembered that O'Dell customarily visited the County Line Lounge on Tuesday nights, "something clicked." Craig went to her garage and found a paper bag containing four pieces of bloody clothing, including a pair of jeans which also had mud on them. Craig brought these clothes into the house and called the police.

Forensic evidence established that the dried blood on two of O'Dell's articles of clothing was the same type as Schartner's in each of the 11 blood classification systems analyzed. Only three out of a thousand persons are in this blood classification. O'Dell's blood was not the same type as Schartner's. O'Dell's car was later seized and searched, and dried blood found on objects in the car also had several enzyme markers consistent with Schartner's blood, but not O'Dell's.

During his incarceration, O'Dell told Steven Watson, a fellow inmate, he had strangled Schartner after she refused to have sexual intercourse with him.

II

PRETRIAL MATTERS

A

Speedy Trial

After the General District Court's finding of probable cause, O'Dell was incarcerated for 18 months before his trial commenced. Citing this delay, O'Dell claims violations of both constitutional and statutory speedy trial protections. We find no merit in either claim.

If the delay in the commencement of trial is attributable to a defendant, there is no violation of his constitutional right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 528-29, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972); *Stephens v. Commonwealth*, 225 Va. 224, 230, 301 S.E.2d 22, 26 (1983). Code § 19.2-243 requires that the trial of an incarcerated defendant commence within five months after probable cause is found. This statutory requirement, however, does not apply to delays caused by continuances granted on the incarcerated defendant's motion.

The orders in the record show O'Dell requested the following continuances of the trial: May 16, 1985 to August 20, 1985; September 24, 1985 to November 12, 1985; November 12, 1985 to February 10, 1986; February 10, 1986 to March 31, 1986; March 31, 1986 to June 30, 1986; June 30, 1986 to August 11, 1986, or a total of approximately 14 months. Because only four months of the period are chargeable to the Commonwealth, we find no constitutional or statutory violation of O'Dell's speedy trial rights.

B

Suppression Motion

O'Dell moved the trial court to suppress the introduction of his clothing in evidence because of a police search and seizure allegedly in violation of his constitutional rights. O'Dell's grounds for suppression ignore the facts here and the controlling constitutional principles.

First, O'Dell contends Craig's consent to the police search of her garage was invalid because of his expectation of privacy in the garage. Craig had ordered O'Dell to leave her house a week before the search, and thereafter he had been living in his car. A few days after she evicted O'Dell, Craig put the clothing he had left in her house on her front porch. When O'Dell called her the afternoon before the murder, Craig told O'Dell his clothes were on the front porch. Some time after the murder, between 2:00 a.m. and 7:00 a.m., O'Dell came by Craig's house and picked up his clothes. O'Dell changed clothes, put his bloody clothes in a paper bag, and placed the bag in Craig's garage.

We need not decide whether O'Dell had an expectation of privacy in the garage. Craig, as owner with a joint right to possession, had the right to consent to its search. *See United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *cf. Chapman v. United States*, 365 U.S. 610, 617-18, 81 S.Ct. 776, 780, 5 L.Ed.2d 828 (1961) (landlord whose tenant had *not* forfeited his right to exclusive possession of the premises cannot consent to search of demised premises).

O'Dell next contends the police officers violated his constitutional rights in ordering Craig to remove his bloody clothes from the paper bag he had left in the garage. O'Dell's reference to the record, however, shows that Craig had already removed the clothing from the bag, and the clothing was on her kitchen floor when the officers arrived.

C

Discovery Matters

(1) *Failure to Provide Reciprocal Discovery*

O'Dell was required to disclose information about his experts to support his request for the Commonwealth's payment of those experts because of O'Dell's indigency. Apparently recognizing that a defendant has no general constitutional right to discovery in a criminal case, *see Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977); *Watkins v. Commonwealth*, 229 Va. 469, 479, 331 S.E.2d 422, 430-31 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986), O'Dell argues that he had a constitutional right of reciprocal discovery under the facts of this case, requiring the Commonwealth to furnish not only the names of all its experts but the substance of their expected testimony.[3]

O'Dell had extensive pretrial information about the background and conclusions of the Commonwealth's expert who did the blood testing, but O'Dell contends he did not know the Commonwealth planned to use three experts to establish the general scientific acceptance of a technique used to analyze and type samples of dried blood known as "multisystem electrophoresis." Nine months before trial, O'Dell knew the Commonwealth's

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[3] Obviously, none of this is required under Rule 3A:11(b). *See Lowe v. Commonwealth*, 218 Va. 670, 678-79, 239 S.E.2d 112, 117-18 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978).

forensic analysts intended to use an electrophoretic technique to identify the dried blood stains on his clothing as being consistent with the blood of Schartner. O'Dell also was aware of the Commonwealth's burden to establish the general acceptance of this technique in the scientific community. In fact, as early as seven months before trial, O'Dell was in contact with Dr. Benjamin Grunbaum, one of the experts O'Dell planned to use to attack the use of electrophoresis on dried blood samples. At least three and a half months before trial, O'Dell was also in contact with another forensic scientist, Dr. Diane Lavett. O'Dell requested an out-of-state witness summons for each of these parties a month before trial.

Dr. Lavett did testify at the trial that the scientific community had not accepted this technique of typing dried blood samples. Dr. Grunbaum could not appear because of a scheduling conflict. Assuming, but not deciding, that the Commonwealth should have furnished O'Dell with its experts' names and the substance of their expected testimony before trial, we conclude that this failure caused no prejudice to O'Dell, who had already contacted his own experts in the field.

(2) *Watson's Plea*

O'Dell claims he was improperly denied discovery of a plea agreement he alleged existed between the Commonwealth and its witness Steven Watson. He cites *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), in support of his right of such discovery. Neither case indicates a defendant has a right to

discover the existence or contents of a plea agreement *prior* to trial. Instead, these cases turn upon undisclosed plea agreements with witnesses who had *already* testified. There is no general constitutional right to such pre-trial discovery in a criminal case. *See Weatherford*, 429 U.S. at 559, 97 S.Ct. at 845; *Watkins*, 229 Va. at 479, 331 S.E.2d at 430. The trial court correctly denied this discovery.[4]

D

Failure to Preserve Evidence

O'Dell claims the trial court should have excluded the electrophoretic test results because the Commonwealth failed to preserve properly the blood-stained clothing for his independent testing, in violation of his constitutional rights. O'Dell also asserts the Commonwealth's expert, who performed the testing, did not properly document all her procedures.

The evidence at trial demonstrated that after a few weeks dried blood cannot be successfully tested unless it has been kept under refrigeration. O'Dell moved for an independent examination months after the Commonwealth performed its tests. The Commonwealth does not usually keep seized articles under refrigeration after it has analyzed them, and it did not do so in this case. The Commonwealth stored the clothing in a routine manner, but, because the blood stains had deteriorated, O'Dell's

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[4] At trial, the court permitted O'Dell to fully develop all pre-trial contacts and negotiations Watson had with the Commonwealth. O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth.

experts did not have an opportunity to run independent tests.

O'Dell argues his constitutional rights were violated because an independent examination may have proven favorable to him, and a review of the test procedures which should have been documented may have demonstrated errors in the Commonwealth's testing. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court held that a state must disclose to an accused all favorable evidence material to his guilt or punishment. In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme Court concluded that, in the absence of; bad faith, deviation from normal practice, official animosity toward an accused, or a conscious effort to suppress exculpatory evidence, a state's failure to preserve evidence seized in a criminal case is not a violation of a defendant's constitutional rights unless the evidence "both possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. at 2534.

Assuming, but not deciding, that a duty to preserve the condition of evidence and to document test procedures is the same as a duty not to destroy evidence, O'Dell failed to show any of the Trombetta conditions for excluding this evidence. We find no bad faith, deviation from routine, official animosity toward O'Dell, or conscious effort to suppress exculpatory evidence. Nor has O'Dell shown that the evidence possessed an apparent exculpatory value before it was placed in storage; to the

contrary, the test results indicated the blood on his jacket was that of Schartner. While O'Dell did not have an opportunity to have independent tests performed on the articles, he had, and used, other means to challenge the validity of the tests the Commonwealth performed. The Commonwealth examiner's records were made available to O'Dell's experts, and O'Dell made full use of them in presenting his challenges to the testing procedure.

We find no violation of O'Dell's constitutional rights in the manner of testing or storage of the evidence.

E

Expert Witnesses

O'Dell complains of the trial court's rulings on a number of matters dealing with expert witnesses. We find no merit in any of his complaints for the reasons which follow.

On O'Dell's motion, the trial court appointed Dr. Joseph Guth, a forensic scientist, to assist him. In justifying his need for the expert, O'Dell specifically mentioned the necessity for an independent survey of hair and blood samples, tire and foot casts, and laboratory techniques used in analyzing this evidence. Dr. Guth did considerable work on some of these matters, his investigation extended over a number of months, and necessitated a number of postponements of the trial date. When Dr. Guth released his tentative report to O'Dell, O'Dell was dissatisfied with at least one conclusion. O'Dell made a motion in *limine* to prevent the Commonwealth from seeing that portion of the report which was unfavorable

to O'Dell. O'Dell indicated he would examine Dr. Guth only on his investigation of the blood stains and moved, therefore, that the Commonwealth's access to the report should be limited to Dr. Guth's analysis of the blood stains.

The permissible scope of cross-examination of a witness is a matter of discretion by a trial court. *See Bunch v. Commonwealth*, 225 Va. 423, 438, 304 S.E.2d 271, 279-80 (1983). O'Dell has shown no abuse of discretion in this case.

O'Dell claims he was entitled to an *ex parte* hearing on the necessity of the Commonwealth's funding of experts to assist him in his defense. O'Dell admits none of the proposed experts would address the question of his sanity, as in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); they were all forensic scientists. O'Dell had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance. *Townes v. Commonwealth*, 234 Va. at 332, 362 S.E.2d at 664; *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. ___, 108 S.Ct. 2097, 98 L.Ed.2d 158 (1987).

O'Dell argues that the trial court permitted an "overloading of prosecution experts." Neither the Supreme Court case of *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, nor any of the other cases O'Dell cites, deals with an alleged "overloading of prosecution experts."

We find no logical or constitutional reason for adopting a *per se* rule requiring the Commonwealth to furnish an indigent defendant with a number of experts equal to

the number the prosecution may call. If the Commonwealth provided O'Dell with the "basic tools of an adequate defense," *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), it complied with the constitutional requirements. The Commonwealth need not supply O'Dell with all services that may be available. *See Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446-47, 41 L.Ed.2d 341 (1974). The testimony of Dr. Guth and Dr. Lavett, the experts supplied to O'Dell by the Commonwealth, and the detailed, articulate, and informed cross-examination of the Commonwealth's experts by court-appointed counsel give ample evidence of the "basic tools of defense" supplied to O'Dell.

O'Dell cites the case of *United States v. Bass*, 477 F.2d 723, 725 (9th Cir.1973), as "condemning appointment of expertise disproportionately to prosecution." In fact, the Bass court merely held that a defendant who is tried in a federal court is entitled to his own psychiatric expert under a specific federal statute. In *Bass*, the government already had two psychiatric experts, yet the court said nothing *whatever* about that being a disproportionate number, although the trial court had appointed only one psychiatrist to assist the defendant.

The trial court had the discretion to decide whether O'Dell needed an expert or experts, and the burden is on O'Dell to show that this discretion was abused. *See Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982). O'Dell has not carried that burden.

Additionally, we note that O'Dell moved for additional experts only a short time before trial. If the trial court had granted the motion, it would have necessitated

yet another continuance. The motion for an expert must be made in a timely fashion. *Moore v. Kemp*, 809 F.2d 702, 710 (11th Cir.), *cert. denied sub nom. Moore v. Kemp*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

F

O'Dell's Representation

(1) *Discharge of Peter Legler*

O'Dell objected to the discharge of his court-appointed counsel, Peter Legler. O'Dell argues not only was he denied the benefit of Legler's participation as counsel, but he was also denied a hearing as to the "reasons . . . or ramifications" of such disqualification of counsel.

We reject O'Dell's contentions. Legler requested to withdraw because of a potential conflict of interest in Legler's representation of O'Dell and another of his clients. Apparently, Legler's other client was a man named David Pruett who, according to O'Dell, had confessed to the Schartner murder. While O'Dell was willing to waive the conflict, there is no showing that Pruett was. Where one lawyer represents multiple clients with divergent interests, *all* clients must waive the potential conflict of interest in order for the attorney to proceed. DR 5-105(C); *see* DR 5-105(B). O'Dell had no right to force Legler to continue as counsel under these circumstances.[5]

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[5] The complaint that O'Dell was not adequately warned of the dangers of waiving counsel with a conflict of interest has nothing to do with this case. O'Dell did not waive the conflict, and the trial court released counsel with the conflict from representation of O'Dell.

The case of *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir.1986), which O'Dell cites, is inapposite. That case involved counsel who were *willing* to continue to represent the defendant, but who were forced by the trial court to withdraw because of an alleged conflict of interest. *Id.* at 608-09. Legler *wanted* to withdraw.

(2) *Standby Counsel's Alleged Conflict of Interest*

Next, O'Dell claims Paul Ray, standby defense counsel appointed to succeed Legler, acquired a conflict of interest during his representation of O'Dell which disqualified him. Ray sought the appointment of a psychiatrist to determine O'Dell's mental state at the time of the murder, his competence to stand trial, and his future dangerousness. O'Dell resisted the examination. Ray responded:

> [T]his defendant is apparently telling the court he does not want a psychiatric evaluation. If that is true, then he should be put under oath and I should examine him on the record because I don't want to get into any problem further on down the road in regard to this particular issue, but I just put that to the Court.

O'Dell *assumes* Ray desired to protect himself against a later charge of ineffective assistance of counsel, and asserts this gave rise to the alleged conflict of interest. O'Dell quoted (and designated for printing in the appendix) only a part of what Ray said, and we think O'Dell misinterpreted what Ray meant. Our reading of Ray's entire statement convinces us that he was referring to the

possibility that O'Dell might later claim he was incompetent to stand trial.

Even if Ray's reason was a desire to protect himself against a later charge of ineffective assistance of counsel, we do not believe that reason, standing alone, constitutes a conflict of interest warranting disqualification. O'Dell cites no case which supports his contention. His reliance upon *United States v. Ellison*, 798 F.2d 1102 (7th Cir.1986), is misplaced. In *Ellison*, the court, considering a claim of ineffective assistance of trial counsel, held that trial counsel had a conflict of interest which precluded him from testifying against the defendant *and* representing him at the same time. Accordingly, we find O'Dell's argument without merit.[6]

(3) *Failure to Appoint Standby Co-Counsel*

O'Dell's complaint of the trial court's failure to appoint co-counsel to act with Ray is premised on Ray's alleged conflict of interest. That premise having failed, we reject this assignment of error.

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[6] At various times during the proceedings in the trial court, O'Dell complained about the quality of Ray's representation. After all the evidence was submitted in the guilt phase, O'Dell told the trial court: "I think Mr. Ray has done an outstanding job, which is contradictory to all my allegations previously."

(4) *Warnings of Self-Representation*

Relying upon *Superintendent v. Barnes*, 221 Va. 780, 273 S.E.2d 558 (1981), O'Dell asserts he was not adequately warned of the dangers of self-representation. Unlike that case, in which the trial court never warned the defendant of such dangers, the record in this case is replete with the trial court's warnings to O'Dell. Moreover, as we noted in *Barnes*, the Supreme Court "has never held that the absence of such a cautionary instruction, standing alone, defeats a waiver." 221 Va. at 784, 273 S.E.2d at 561. Additionally, O'Dell's extensive experience in the criminal justice system and his demonstrated skill in raising objections in this trial belie any claim now that he did not understand the dangers of self-representation. For these reasons, we reject this argument.

III

JURY MATTERS

A

Unilateral Right to Bench Trial

O'Dell extrapolates from his constitutional right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), or to represent himself, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and his constitutional rights to a jury trial, U.S. Const. amend. VI; Va. Const. art. I, § 8, a constitutional right to demand a trial by a judge. O'Dell overlooks the Commonwealth's interest.

While the Commonwealth has no voice in O'Dell's decision as to who will defend him, it does have an equal

voice with O'Dell in the decision whether the case will be tried by a judge. Va. Const. art. I, § 8; *Pope v. Commonwealth*, 234 Va. 114, 122, 360 S.E.2d 352, 358 (1987). Accordingly, we reject this contention.

B

Venire Not a Valid Cross-Section

We deny O'Dell's various challenges to the venire for several reasons:

(1) O'Dell introduced no evidence to substantiate his claim that the venire was unrepresentative of the community. His reference to census figures in footnotes to his brief, even if they supported his claim, did not make these figures a part of the evidence. *See Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 1764, 90 L.Ed.2d 137 (1986); *Reil v. Commonwealth*, 210 Va. 369, 373, 171 S.E.2d 162, 165 (1969).

(2) O'Dell asserts the trial court erred in directing the clerk not to draw jurors who had served on a capital murder case during the then-current term. The clerk apparently misunderstood and excluded the first 24 veniremen who had served on any criminal case during that term, but the clerk did not exclude such persons from the next 28 veniremen who were drawn. O'Dell makes no showing of prejudice arising from these matters.

Also, O'Dell overlooks the provisions of two Code sections in claiming these actions of the trial court and the clerk violated Code §§ 8.01-349, -350.1, -351, and -352 and compel a new trial. Code § 8.01-355 permits the trial

court to excuse any jurors whose names were drawn for service on a particular panel and, thus, authorizes the trial court's direction to the clerk. The clerk's misunderstanding of the trial court's direction and the subsequent exclusion of all jurors who had served on any felony panel in the then-current term was an irregularity under Code § 8.01-352(A), which is cured under Code § 8.01-352(B), because the exclusion was not intentional, nor did it operate to cause any prejudice to O'Dell. Accordingly, we find no reversible error in the selection of the venire.

C

Failure to Allow Additional Challenges

O'Dell argues that he should have been permitted an unspecified number of additional peremptory challenges because a number of prospective jurors had ties to the military or law enforcement. No Virginia or Federal authority supports this assignment of error, and since O'Dell failed to show deficiencies in the composition of the jury, we reject his claim of entitlement to additional challenges.

D

Questions to Venire by Court and Commonwealth's Attorney

(1) *Comments Regarding Jury's Role in Death Penalty*

O'Dell contends both the Commonwealth's Attorney and the trial court attempted to diminish the jury's sense

of responsibility in this capital case by stressing that the jury would merely recommend the death penalty rather than actually "impose" it. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court prohibited comment by a trial court or argument by a prosecutor that the jury's determination of a death sentence is automatically appealable. In *Frye v. Commonwealth*, 231 Va. 370, 397, 345 S.E.2d 267, 286-87 (1986), the Commonwealth's Attorney argued to the jury that the responsibility for fixing the death sentence was not the jury's, but that of the court. The trial court overruled a defense objection, stating in the jury's presence that its verdict would be a recommendation. We reversed, citing Caldwell.

The trial court and the Commonwealth's Attorney did make statements to the venire in voir dire to the effect that the jury would "recommend" the sentence. These statements, which were a small part of the information given to the jury, were never repeated in the trial. A review of the entire record shows that the jury explicitly was told it actually *fixed* the punishment, as the first instruction and the form of the verdict clearly stated. Therefore, we find no prejudicial error in these remarks.

(2) *Nature of Commonwealth's Voir Dire Questions*

The trial court and the Commonwealth's Attorney asked fewer questions of the venire designed to eliminate those veniremen favoring an automatic death sentence upon a capital murder conviction than they did to eliminate those veniremen unalterably opposed to a death

sentence. O'Dell argues that, taken as a whole, these questions were, therefore, "slanted so as to impress the jury with the probability of the death penalty in an unconstitutional manner." O'Dell cites *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), in support of this argument. In *Patterson*, we held it was error for a trial court to refuse to ask *any* questions testing a juror's prejudice toward automatic death sentences in capital murder cases. *Id.* at 658-59, 283 S.E.2d at 216. Our review of the questions asked in this case by the trial court and Commonwealth's Attorney does not reveal an effort to impress the jury with the probability of the imposition of the death penalty. We decline to establish a rule requiring an equal number of questions to be posed during *voir dire* on opposing issues, so long as each issue is fairly developed.

(3) *Commonwealth's Comments on O'Dell's Testifying*

O'Dell is in error when he claims the Commonwealth's Attorney "went into extensive discourses [to the venire] on the merits of Mr. O'Dell taking the stand." O'Dell cites only one instance to support his claim. The "discourse" occurred after O'Dell had asked venireman Villandre the following questions:

> MR. O'DELL: You as a fair-minded citizen, after the Commonwealth has presented its version of the case, would you expect to hear the defendant's side of the case?
>
> MR. VILLANDRE: Yes.
>
> MR. O'DELL: Would you expect the defendant to take the stand and testify?

MR. VILLANDRE: According to the judge, he doesn't have to.

MR. O'DELL: Yes, sir. If the defendant did not testify, would you think that he was trying to hide something or would that indicate to you in any kind of way that he was guilty?

MR. VILLANDRE: I would try to think it did not.

MR. O'DELL: Would there be some doubt in your mind – the fact that the defendant is defending himself and the fact that he didn't take that stand? It's kind of premature I guess for me to ask you this, but do you think that it would in any kind of way affect your impartiality?

MR. VILLANDRE: There is a possibility that it might. As you said, that is a very difficult thing.

O'Dell opened the door on the subject, requiring the Commonwealth to ask a series of questions intended to make it clear to prospective juror Villandre that no negative inference could be drawn from O'Dell's failure to testify.

Accordingly, we reject this contention.

E

Retention or Exclusion of Veniremen

O'Dell argues the trial court erroneously retained some veniremen, and erroneously excluded others. The trial court saw and heard the examination of each venireman, and its findings are entitled to great weight. We will not reverse those findings on appeal unless manifest

error has been shown. *Gray*, 233 Va. at 339, 356 S.E.2d at 171; *see Wainwright v. Witt*, 469 U.S. 412 at 431, 105 S.Ct. 844 at 856, 83 L.Ed.2d 841 (1985). No such error has been shown in any of the following instances on which O'Dell bases his claim.

(1) *Claimed Errors in Retention*

O'Dell assigns error to the trial court's retention of a number of prospective jurors on the panel despite various alleged disqualifications.

O'Dell contends Mr. Esenburg was disqualified because of an interest in the outcome of the case. Esenburg was an alternate who was struck (presumably by O'Dell). Because none of the alternates who heard the evidence participated in the jury's deliberations, the error, if any, was harmless. *Gray*, 233 Va. at 339, 356 S.E.2d at 171.

O'Dell challenges the retention of two veniremen, Mr. Thurston and Mr. Villandre, on the panel because they allegedly could not "totally disregard the effect of [O'Dell's] assertion of his Fifth Amendment [privilege against self-incrimination] and would not give him the benefit of the presumption of innocence." O'Dell argues that Thurston's answers to the following question propounded by O'Dell established Thurston's unwillingness to give O'Dell the benefit of his constitutional rights.

MR. O'DELL: . . . The fact that the defendant was arrested and indicted by the grand jury of Virginia Beach – does that make you feel that he knows something about the crime or that he is guilty of the crime?

> MR. THURSTON: Not that he is guilty. That he may know something about it because otherwise he would not have been indicted. There must be some doubt in someone's mind.

Thurston's other statements made it abundantly clear that Thurston would accord O'Dell his constitutional rights, and we find nothing in this exchange which demonstrates an inference of guilt from O'Dell's arrest and indictment.

O'Dell objected to Mr. Foust as a venireman because Foust said he would give a police officer's testimony more weight than that of the average citizen. Foust responded in the affirmative to the following questions:

> MR. O'DELL: [I]f a police officer was to take the stand and testify to certain facts in this case and you listened to his testimony real closely and an average citizen came in and testified on the stand, would you give that police officer's testimony more weight than you would the average citizen?
>
> MR. O'DELL: If that police officer's testimony conflicted with someone else's testimony that was not a police officer, would you tend to believe the police officer more so than the other person?

Bias cannot be presumed solely because a prospective juror believes a police officer's training and experience in observing and recounting events might make the officer's account more accurate than that of an ordinary witness, provided the prospective juror does not ignore differing circumstances of observation, experience, and bias which may be disclosed by the evidence. Foust's freedom from

bias was abundantly clear in this record. For that reason, we reject O'Dell's contention that Foust had a bias in favor of police testimony.

(2) *Claimed Errors in Exclusion*

O'Dell contends the trial court erroneously excluded the following three members of the jury panel for cause. We disagree for the reasons which follow.

O'Dell says the trial court struck Mrs. McClellan as soon as she stated that she would require a "moral certainty" to convict rather than a "reasonable doubt." On the contrary, the record discloses two pages of testimony following Mrs. McClellan's statement in which O'Dell unsuccessfully attempted to rehabilitate McClellan. Although O'Dell argued at trial that his subsequent questions "covered the beyond a reasonable doubt aspect of the case," our review of the transcript reveals that O'Dell never asked McClellan if she would apply the reasonable doubt standard.

The record also indicates a number of instances when McClellan paused or failed to answer important questions on *voir dire*, as well as her considerable ambivalence about imposing the death penalty and her significant equivocation about her understanding of the standard of proof required in this case.

Both Mrs. Jones and Mr. Fiutko indicated they might not be able to follow the court's instructions because of their feelings about the imposition of the death penalty. A juror may be struck from the panel under the Federal Constitution if his "views would prevent or substantially

impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); *see Lockhart*, 476 U.S. at 174, 106 S.Ct. at 1765; *Wainwright v. Witt* 469 U.S. at 424, 105 S.Ct. at 852.

IV

GUILT PHASE

A

Evidentiary Questions

(1) *Admission of Electrophoretic Tests*

O'Dell argues the court improperly admitted in evidence the results of the electrophoretic tests, and assigns a number of grounds in support of his argument. We find none of them to have merit.

First, O'Dell argues that he was entitled to a separate hearing out of the presence of the jury to enable the trial court to make a determination of the admissibility of the test results. A separate hearing is generally advisable to avoid a possible mistrial in the event a trial court concludes the tests are not sufficiently reliable to be introduced in evidence. Because we find the trial court did not err in admitting in evidence the results of the electrophoretic tests, we conclude that O'Dell has not been prejudiced by the trial court's failure to conduct a hearing out of the jury's presence.

Second, O'Dell contends the Commonwealth failed to show the use of the electrophoretic technique on dried

blood stains was generally accepted by the scientific community or sufficiently reliable for the results to be admissible in evidence. He urges upon us the so-called "*Frye* test," contending that a trial court must be convinced not only of the reliability of the test, but also of its general acceptance by the scientific community in the particular field in which the test belongs. *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). The "*Frye* test" has generated considerable criticism. *See, e.g.*, Moenssens, *Admissibility of Scientific Evidence – An Alternative to the Frye* Rule, 25 Wm. & Mary L. Rev. 545 (1984).

We see no reason to adopt the *Frye* test. Even if it were the law in Virginia, the evidence was sufficient to meet it.[7] The testimony of Dr. George Sensabaugh, a professor of biomedical and environmental health sciences at the University of California, with extensive experience in the field of forensic biology and medical microbiology, indicated the multisystem method of electrophoresis used to test Schartner's blood and O'Dell's

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[7] We note O'Dell's argument that the trial court merely took judicial notice of the reliability of the electrophoretic technique. The trial court, when describing the grounds for admitting the tests, said "The Court has ruled and taken judicial notice that the procedural concept of electrophoresis is generally accepted. I think Dr. Sensabaugh has more than shown that it is generally accepted in the United States."

Judicial notice involves the admission of a fact in evidence without proof of that fact because it is commonly known from human experience. *Darnell v. Baker*, 179 Va. 86, 93, 18 S.E.2d 271, 275 (1942). The trial court's full statement indicates it did not take judicial notice of the reliability of the electrophoretic technique; instead, it found it as a fact, based on the testimony of Dr. Sensabaugh.

blood was reliable and generally accepted in the field of forensic science. O'Dell's second argument, that the evidence of a test's reliability and acceptance must come from an "independent" expert, is also met. Dr. Sensabaugh was such an "independent" expert, and, therefore, met this condition.

O'Dell's third argument centers upon the reliability of the method used to perform the tests on the dried blood samples, the experience and competence of the examiner who performed the tests, and the manner in which she did the tests. Each side introduced evidence supporting its respective positions on these issues.[8] All three of these questions were factual issues involving the weight of the evidence rather than its admissibility, and were properly resolved by the jury. *See Ellis v. International Playtex, Inc.*, 745 F.2d 292, 303 (4th Cir.1984); *cf. Walrod v. Matthews*, 210 Va. 382, 389, 171 S.E.2d 180, 186 (1969).

(2) *Witness Watson*

O'Dell maintains the trial court should have allowed him to cross-examine Watson about letters Watson had

[8] O'Dell's evidence came primarily from Dr. Diane Lavett, a forensic scientist. O'Dell cites a number of articles and studies in various publications allegedly questioning the validity of the tests. These articles apparently contain factual information and conclusions and could only be considered by the court after being properly placed in evidence. *Cf. Hopkins v. Gromovsky*, 198 Va. 389, 394-95, 94 S.E.2d 190, 193-94 (1956). None of the articles and studies was introduced in evidence and, therefore, we do not consider them.

written to three Virginia circuit court judges a number of years prior to this crime. O'Dell did not tender the letters as exhibits, and we find none of them in the record. Therefore, we must assume the trial court correctly ruled that the letters were not sufficiently relevant to show Watson's bias. Furthermore, the trial court made it clear at the time of its ruling that O'Dell was not precluded from introducing any other evidence which might show Watson solicited leniency in the terms of his probation in exchange for his testimony.

O'Dell argues Watson was not permitted to answer his question, "Did you tell Larry Talkington, your codefendant in that case you were extradited back on, in forty or fifty other B & E's, breaking and enterings,[9] that if you got caught you would like to keep yourself from going to jail because you had been there before?" (Emphasis added.) When the Commonwealth's objection to the question was argued before the trial court, O'Dell said his question was, "Did you tell Larry Talkington, your codefendant in that instance that you was extradited back on, that if you got caught you would *lie* to keep from going to jail in those forty or fifty B and E's because you had been to jail there before?" (Emphasis added.)

We will not speculate what the answer might have been to these questions. The answers were not proffered for the record. Furthermore, when O'Dell put Talkington on the stand, he never asked Talkington about Watson's alleged statement. We will not consider testimony which

[9] O'Dell later admitted he was wrong in characterizing the charges as 40 or 50 B & E's, there were only four or five B & E's.

the trial court has excluded without a proper showing of what that testimony might have been. *Wyche v. Commonwealth*, 218 Va. 839, 843, 241 S.E.2d 772, 775 (1978); *Whittaker v. Commonwealth*, 217 Va. 966-968-69, 234 S.E.2d 79, 81 (1977).

Likewise, we will not consider O'Dell's objection to the trial court's refusal to permit Talkington to testify as to whether Watson had ever been a police informant. No answer was proffered. Although O'Dell complains he "was not even permitted to proffer the questions he wished to pursue on this line," the record shows that the trial court merely refused to delay jury proceedings for the proffer; O'Dell could have made the proffer after the jury retired. Later, without having made the proffer, O'Dell asked that Talkington be excused. Accordingly, we will not consider O'Dell's complaint of a denial of proffer.

B

Other Rulings as to Witness Watson

O'Dell characterizes Watson's conflicting statements concerning the number of his prior felony convictions as perjury. At one time, out of the presence of the jury, Watson said he had six convictions, and later, before the jury, he correctly said he had seven convictions. O'Dell did not question Watson's explanation of his confusion as to a seventh conviction on concurrent charges in West Virginia. The jury was given the correct number of Watson's convictions, and O'Dell suffered no prejudice.

O'Dell is wrong in his claim that the trial court refused to hold a hearing to determine the admissibility

of Watson's evidence. The appendix and transcript reflect that the trial court held a separate hearing in which O'Dell fully exercised his opportunity to question Watson and to argue the matter of admissibility.

C

Instruction

O'Dell assigns error to the inclusion of the italicized language in the following instruction:

> The Court instructs the jury the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. *This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence.* However, suspicion or probability of guilt is not enough for a conviction. There is no burden on the defendant to produce any evidence.
>
> A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

We find this language properly balanced the instruction as to what constitutes proof beyond a reasonable doubt. Moreover, we find the disputed language is consistent with the language of the standard instruction on circumstantial evidence the trial court gave the jury. We

conclude that the trial court did not err in granting this instruction.

D

Sufficiency of the Evidence to Convict

O'Dell, characterizing the case against him as "non-existent" apart from the serological evidence, argues the court should have directed the verdicts of acquittal on all three indictments. Because the trial court properly admitted the serological evidence and because there was other evidence to support the conviction, we need not consider this assignment of error. We find the evidence adduced at trial to be sufficient to convict O'Dell of all three crimes.

V

PENALTY PHASE

A

Admissibility of Evidence of Future Dangerousness

(1) *Unadjudicated Crimes and Juvenile Findings of Not Innocent*

O'Dell objects to the admission of evidence of a prior attempted rape in Florida, claiming the Florida court dismissed the charge on the merits prior to trial for lack of evidence. In support, O'Dell proffers only his unsworn statement during trial that "[t]he sexual battery was dropped, Your Honor, by the Court." O'Dell's statement is not sufficient to show an adjudication of the charge. O'Dell filed the record of the proceeding in Florida, but the trial court did not admit it in evidence because O'Dell

failed to have it properly authenticated. Nonetheless, we have reviewed the Florida record and find *no* reference to a dismissal of the attempted rape charge on the merits.

O'Dell argues that evidence of unadjudicated crimes and juvenile findings of not innocent are not admissible in the penalty stage of trial. We adhere to our consistent position that "a trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible." *Beaver v. Commonwealth*, 232 Va. 521, 529, 352 S.E.2d 342, 347, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (juvenile offenses and unadjudicated criminal activity held admissible in penalty phase of capital murder case). Accordingly, we reject O'Dell's contentions.

(2) *Convictions More than 10 Years before this Conviction*

O'Dell suggested at trial that Rule 609(b) of the Federal Rules of Evidence precluded the introduction of evidence of convictions more than 10 years before the subject crime. We have no such rule.

O'Dell cites no authority indicating the admission of such prior convictions presents constitutional issues. The only case he cites in support of his proposition is *State v. Beal*, 311 N.C. 555, 565, 319 S.E.2d 557, 563 (1984), which turned on a construction of North Carolina and Alabama statutes, and did not involve the constitutional issue O'Dell raises. There is no merit in this argument.

B

Admission of Evidence of Vileness

O'Dell did not brief his assignment of error dealing with the admission of evidence of the "vileness" of the murder and, therefore, we will not consider it. Rule 5:27(e). He does assign separate error and argue that an instruction on vileness "was fatally duplicitous." We need not rule on this contention because the jury did not base its verdict on the vileness predicate.

C

Exclusion of Mitigating Evidence

O'Dell argues that he was entitled to introduce evidence and to have the jury instructed that in the event he received a life sentence, he would not be eligible for parole. We have rejected similar arguments in our previous capital murder cases, and do so now for the reasons stated in those cases. *See Williams v. Commonwealth*, 234 Va. 168, 179-80, 360 S.E.2d 361, 368 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836-37, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

D

Instructions on Mitigating Circumstances

O'Dell argues the trial court failed "to give the jury *any* guidance as to the nature and function of mitigating circumstances." O'Dell tendered copies of 22 instructions on mitigation which a defendant proffered in a capital

murder case in the State of Georgia. He also tendered an annotation of eight of Mississippi's model jury instructions drafted for use in the sentencing phase of trial and a North Carolina jury form of interrogatories on mitigation. We find the trial court correctly refused to give these purported instructions because they did not correctly state Virginia law, or they submitted principles of law inapplicable to the facts in this case. The instructions granted sufficiently covered the subject of mitigation.

E

Admission of Hearsay

O'Dell now objects to the postsentence report as "inaccurate hearsay." His objection to the report at trial was limited to the information elicited from his sister, who he said had "no knowledge of it. Anything she says is completely hearsay." Although the trial court afforded O'Dell an opportunity to correct any misstatements in the report, and he did so as to other statements, he never said his sister's statements were "inaccurate," only that they were "completely hearsay." During the sentencing phase of a capital murder case, the court may consider hearsay evidence, favorable or unfavorable to the defendant, contained in a postsentence report. This is implicit from the language of Code § 19.2-264.5 and Code § 19.2-299, which permit a probation officer "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts."

O'Dell also contends the person who prepared the report was not called as a witness. The record shows that Sandra E. Mann, the probation officer who prepared the

report, did testify, and O'Dell cross-examined her. This is in contrast to the case O'Dell cites, *Gardner v. Florida*, 430 U.S. 349, 356, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), in which the trial court did not even show the defendant the presentence report, let alone afford him an opportunity to cross-examine the person who prepared it. We reject O'Dell's contentions on this issue.

VI

MISCELLANEOUS ISSUES

A

Restrictions on O'Dell's Right to Defend Himself

O'Dell complains that "Ray's interference in the trial- . . . violated" his right to represent himself. Specifically, he contends it destroyed the jury's perception that O'Dell was representing himself. *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984).

The trial court told the jury O'Dell was acting as his own attorney, but Ray, as standby counsel, would assist O'Dell. O'Dell cites no instance in the trial in which Ray did not defer to O'Dell's decisions in presenting his defense. In fact, the record reflects Ray deferred to O'Dell in every instance of disagreement. A reading of the entire record convinces us that O'Dell clearly and convincingly projected the image of self-representation to the jury. O'Dell conducted the voir dire examination of 31 of the jurors, and made the opening statement, in which he told the jury he was a *pro se* defendant. O'Dell conducted extensive cross-examination of eight of the Commonwealth's key witnesses, and the direct examination of five

of the witnesses he called to the stand. Additionally, he made many objections before the jury. The record leaves little doubt that O'Dell controlled all vital portions of his defense before the jury and before the court.[10] Ray's involvement was substantially less than that of standby counsel in *McKaskle*, and was well within the reasonable limits the United States Supreme Court articulated in *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951.

Neither of O'Dell's claims that the trial court erroneously restricted his closing argument in the penalty phase, and would not permit O'Dell to allocute to the jury before sentencing in violation of his constitutional rights have merit. O'Dell is wrong on the facts – the trial court did *not* restrict O'Dell from arguing his innocence in the penalty phase. The trial court merely said O'Dell was confined to arguing the evidence in the record, and could not argue evidence which had not been introduced. Allocution occurs before the court which pronounces the sentence, Code § 19.2-298; the jury does not sentence the defendant, it only "ascertains" the punishment in its verdict, Code § 19.2-295.

Over the Commonwealth's objection, O'Dell argued successfully for Ray's participation in the suppression hearings. The United States Supreme Court pointed out in *McKaskle*, "Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent

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[10] O'Dell's motions encompass 792 pages of the appendix. Except for a limited number of typed pages, which standby counsel may have prepared, and copies of newspaper clippings, the balance is entirely in O'Dell's handwriting, amply evidencing his unrestricted self-representation.

appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." 465 U.S. at 183, 104 S.Ct. at 953. Our review of the record fails to disclose *any* objection to Ray's participation thereafter, except O'Dell's contention of Ray's alleged "conflict of interest."

O'Dell now claims Ray's interference denied him the opportunity to make his own closing statement. The trial court ruled that either O'Dell or his counsel, but not both, could make the closing argument. A trial court has broad discretion in the supervision of opening statements and closing argument. *See Jordan v. Taylor*, 209 Va. 43, 51, 161 S.E.2d 790, 795 (1968). We find no abuse of that discretion in limiting the number of persons who could argue on each side in this case.

We find O'Dell's allegations of impermissible restrictions on his right to defend himself to be meritless.

B

Prosecutorial Misconduct

O'Dell complains of prosecutorial misconduct, alleging a number of incidents before, during, and after the trial. We need not discuss each complaint. Some were simply not established by the record. Other alleged incidents O'Dell did not object to, nor did he move for a mistrial or request precautionary instructions at the time, preventing our review at this time. Rule 5:25; *see Blount v. Commonwealth*, 213 Va. 807, 811, 195 S.E.2d 693, 696 (1973). Finally, our review of the entire record convinces

us that those minor deviations from a Commonwealth's Attorney's duty to conduct himself in a proper manner,[11] which O'Dell properly preserved for appeal, were clearly insufficient to deny him a fair trial.

C

"Heightened Reliability" Requirement

O'Dell contends that a so-called "heightened reliability" standard created by the Eighth Amendment to the United States Constitution requires us to reverse his death sentence. We disagree. The standard of proof is beyond a reasonable doubt. There is no heightened reliability standard in a capital murder case. Nor do the cases relied upon by O'Dell support the existence of such a standard.

The only reason O'Dell gave supporting this assignment of error was that "[i]t is undisputed that David Pruett confessed to the crime long before trial." O'Dell does not refer to any supporting testimony in the record, only to his own unsworn statements indicating that he had heard Pruett admitted to his lawyer and minister he had murdered Schartner.

O'Dell had the trial court make arrangements so Pruett could testify, but then later requested the trial court to excuse Pruett. O'Dell attempts to justify his

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[11] One of the Assistant Commonwealth's Attorneys wrote a letter to an expert witness for the defendant *after* the trial was over, criticizing her testimony. We do not approve of such conduct by prosecutors, but the letter was written *after* the trial and, therefore, did not affect the result.

action by claiming Pruett had a Fifth Amendment privilege against self-incrimination. O'Dell ignores the effect of Code § 19.2-270, which would have compelled Pruett to testify. *Cunningham v. Commonwealth*, 2 Va.App. 358, 344 S.E.2d 389 (1986).

O'Dell also erroneously claims a "priest-penitent" privilege justifies his failure to present the testimony of the minister who allegedly heard Pruett's confession of Schartner's murder. Code § 19.2-271.3 creates a "priest-penitent" privilege in criminal cases, but limits the privilege to "information communicated to [the minister] by the accused." O'Dell, not Pruett, is the accused in this case.

We find no merit in this assignment of error.

VII

SENTENCE REVIEW

A

Propriety of Death Sentence

O'Dell claims the jury imposed the sentence of death "under the influence of passion, prejudice or any other arbitrary factor." O'Dell refers to nothing in the record in support of this argument, but Code § 17-110.1(C)(2) requires us to review the record to determine if the jury was so influenced. Our review fails to disclose that the jury was motivated by any of these arbitrary influences in fixing O'Dell's punishment at death.

Code § 17-110.1(C)(2) also requires us to determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Our comparison of the records of our prior capital murder decisions, accumulated pursuant to Code § 17-110.1(E), convinces us that the sentence in O'Dell's case is not excessive or disproportionate to penalties imposed in similar cases for the reasons which follow.

The murder of Schartner was brutal. Schartner was strangled to death with a force sufficient to break bones in her neck and leave finger imprints on her neck. She was beaten so severely about the head that eight separate marks were left on her skull. A number of other injuries on her body indicated she attempted to ward off blows from a blunt object. The evidence also showed Schartner had been murdered during the commission of, or subsequent to, her rape.

In considering the defendant, we find a lengthy criminal record. O'Dell, born in 1941, began his criminal career at the age of 13 with a juvenile conviction of breaking and entering. During the next three years, he was convicted five times of auto theft.

In 1958, his career escalated to crimes of violence, with three assault convictions that year, as well as a conviction for threatening bodily harm. The following year, O'Dell was convicted of an attempted escape from the penitentiary. Only five months after his discharge from the penitentiary, O'Dell's probation was revoked. He was convicted of five armed robberies and five unauthorized uses of motor vehicles, and sentenced to

confinement in the penitentiary for 24 years. While he was in the penitentiary, O'Dell was convicted of second degree murder.

After his parole from the penitentiary in July of 1974, O'Dell went to Florida, where he was convicted of a kidnapping and robbery, which occurred in February of 1975. The victim in that case testified as to the details of her robbery and subsequent abduction, as well as O'Dell's assault upon her in an attempted rape. During that assault, she said O'Dell struck her several times on the head with his gun, choked her, and held a cocked gun to her head in his effort to force her to submit to his sexual advances. The Florida court sentenced O'Dell to a 99-year confinement, but in December of 1983 he was released on parole. Fourteen months after that release, Schartner was murdered.

Because the jury based O'Dell's sentence of death upon his "future dangerousness," we give special attention to our prior decisions in which the death penalty was imposed upon a similar finding of probability that a defendant would be a continuing threat to society. *Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 528, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983). This record equals, and in some cases surpasses, the records in a number of cases in which juries have returned verdicts for the death penalty based on "future dangerousness." *Williams*, 234 Va. 168, 360 S.E.2d 361; *Pope*, 234 Va. 114, 360 S.E.2d 352; *Peterson*, 225 Va. 289, 302 S.E.2d 520; *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Taking into account both O'Dell and the crime he perpetrated, and comparing his case with similar cases, we find that juries in this jurisdiction generally fix the death penalty for criminal conduct similar to O'Dell's.

VIII

CONCLUSION

Our review of the record discloses no reversible error. Accordingly, we affirm the judgments of the trial court.

Affirmed.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

At Law No. CL89-1475

CHARLES H. THOMPSON, Warden, Mecklenburg Correctional Center Boydton, Virginia; EDWARD W. MURRAY, Director, Virginia Department of Corrections; MARY SUE TERRY, Attorney General of the Commonwealth of Virginia; and the COMMONWEALTH OF VIRGINIA,

Respondents.

ORDER

This Court, having considered the amended petition for a writ of habeas corpus, the motion and the supplemental motion to dismiss of the respondents, the memorandum and supplemental memorandum in opposition to the motion to dismiss, the response to the petitioner's memorandum and the motions for DNA testing and for a psychological evaluation of the petitioner to both of which the respondents consent, and this Court having taken testimony and heard argument on these matters on August 22, 1989, finds that the following claims in the petition for a writ of habeas corpus will be denied because they were not raised at trial and on appeal in violation of the principles enunciated in *Slayton v. Parrigan*, 215 Va. 27 (1974):

IIA(2). Paragraphs 163 through 165 alleging that the trial court improperly failed to monitor the performance of petitioner acting as his own counsel;

V. Paragraphs 220 through 229 alleging that the aggravating factors of vileness and future dangerousness are unconstitutionally vague;

VI. Paragraphs 230 through 234 alleging that the jury was improperly instructed that it had to be unanimous as to each aggravating factor;

X. Paragraph 263 alleging that the Commonwealth failed to disclose exculpatory statements by David Pruett;

XI. Paragraphs 265 through 271 alleging that a change of venue should have been granted and that the jury should have been sequestered;

XIV. Those parts of paragraphs 281 through 283 alleging that venirepersons Kelly and Thornton were improperly retained;

XVII. Paragraphs 296 through 297 alleging that electrocution is cruel and unusual punishment.

The court finds on the basis of the aforementioned pleadings and proceedings that the following allegations will be denied because they were previously considered by the Supreme Court of Virginia on petitioner's direct appeal. *Hawks v. Cox*, 211 Va. 91 (1970):

I. Paragraphs 136 through 142, alleging that immaterial and irrelevant evidence of an unrelated crime was admitted;

IIA(!). Paragraphs 155 through 157 alleging that the trial court failed to provide appropriate warnings about self-representation to the petitioner;

IIA(1). Paragraph 159 alleging that petitioner's original attorney was improperly permitted to withdraw;

IIA(3). Paragraphs 166 through 168 alleging that the petitioner was denied the resources necessary to represent himself;

III. Paragraphs 179 through 191 alleging that petitioner was improperly refused an opportunity to advise the jury that he would be ineligible for parole;

IVA. Paragraphs 193 through 195 alleging that the court improperly admitted electrophoretic evidence;

IVC. Paragraphs 200 through 203 claiming that tests were not performed with appropriate scientific testing controls;

IVD. Paragraphs 203 through 204 alleging that the Commonwealth failed to preserve evidence;

IVE. Paragraphs 205 through 206 alleging that petitioner was improperly denied ex parte hearings;

IVF. Paragraphs 207 through 210 alleging that the petitioner was improperly denied reciprocal discovery;

IVG. Paragraphs 211 through 213 alleging that the Court improperly refused to limit the number of experts for the Commonwealth;

IVH. Paragraphs 214 through 216 alleging that the petitioner was improperly restricted in his cross-examination of a prosecution witness;

IVI. Paragraphs 217 through 219 claiming that the Court improperly refused to limit the testimony of the petitioner's expert;

VII. Paragraphs 235 through 241 alleging that the penalty phase instructions were constitutionally inadequate:

VIII. Paragraphs 242 through 247 alleging that the Court improperly restricted cross-examination of the witness Watson;

IX. Paragraphs 250 through 255 claiming that the testimony at trial of the witnesses Watson, Craig and Christianson was unreliable;

X. Paragraph 262 alleging that the Commonwealth improperly failed to produce exculpatory evidence with respect to the witness Watson;

XII. Paragraphs 272 through 276 alleging that the trial court improperly advised the jury that its role was to recommend a sentence;

XIII. Paragraphs 277 through 280 claiming that the jury panel was not a valid cross-section of the community;

XIV. Those parts of paragraphs 281 through 285 alleging that venirepersons Thurston, Villandre, and Foust were improperly retained or that venirepersons McClellan, Fiutko, and Jones were improperly excluded from the panel;

XV. Paragraphs 286 through 290 claiming that the *voir dire* questions were improperly slanted towards the death penalty;

XVI. Paragraphs 291 through 295 alleging that improper and unreliable evidence was introduced at the penalty phase;

XIX. Paragraphs 302 through 310 claiming that the Supreme Court improperly applied its procedural rules;

The Court also dismisses, without prejudice, claim XVIII, set forth in paragraphs 298 through 301, which alleges that petitioner is presently insane so that his execution would be unconstitutional because to this point petitioner has not produced any evidence to support that claim.

This Court dismisses claim XX, set forth in paragraphs 310A through 310D, alleging that petitioner was denied effective assistance of counsel on appeal, because the petitioner has failed to demonstrate any prejudice based on the alleged ineffectiveness.

The Court also dismisses paragraphs 176 through 178 of claim IIB alleging that the status and duties of stand-by counsel prevented effective assistance, and that portion of claim IIA which states in paragraph 148(c) that the petitioner's waiver of counsel was constitutionally

invalid because his stand-by counsel was inexperienced, unprepared, and ineffective because petitioner waived his Sixth Amendment right to counsel.

The Court retains that portion of claim II(A)1, set forth in paragraphs 149 through 154 and 160 through 162, and claim II(A)4, set forth in paragraphs 169 through 175, which allege that petitioner's waiver of his right to effective assistance of counsel was invalid, pending psychiatric and neurological evaluation of petitioner, whose transportation to Staunton Correctional Facility on September 29, 1989 and Buckingham Correctional Facility on October 25, 1989 has been ordered by separate orders upon the consent of respondents (Tr. 47, 58).

The Court further retains that portion of claim IX, set forth in paragraph 256, which alleges that on the basis of cumulative error the serological evidence at trial was unreliable pending the performance of the DNA testing ordered by separate order on the consent of the respondents and that portion of claim IV, (IVB), paragraphs 196 through 199, alleging that the trial court improperly found the test performed by Emrich to be reliable.

Discovery relating to competency and DNA may proceed after consultation between counsel (Tr. 100-01). New evidence or discovery to permit new evidence will only be permitted as to these two claims.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

ENTER: 1/31/90

TJ

JUDGE

I ask for this:

/s/ Illegible
Counsel for Respondents

Seen and objected to:

/s/ Illegible
Counsel for Petitioner

/s/ Illegible
Counsel for Petitioner

/s/ Illegible
Counsel for Petitioner

Certified to be a TRUE COPY of record in my custody. J. Curtis Fruit, Clerk Custodian

BY: /s/ Barbara Illegible
Deputy Clerk

[Caption Omitted In Printing]

ORDER

This Court, having considered the second amended petition for a writ of habeas corpus, the fourth motion to dismiss of the respondents, the memorandum in opposition to that motion to dismiss, and all of the previous pleadings filed herein; and this Court having heard argument on these matters on August 14, 1990, for the reasons set forth in the order of this Court entered on January 31, 1990 and for those additional reasons set forth at the conclusion of the argument on August 14, 1990, dismisses all of the claims in the second amended petition for a writ of habeas corpus with the exception of the following claims which were retained by that order:

> Claims II(B)2 and II(B)4 and IIE, set forth in paragraphs 183-189, 196-198 and 203-209, alleging that petitioner's waiver of counsel was invalid;
>
> Claims IVB and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable.

The Court, on the basis of the aforementioned pleadings and proceedings, dismisses the following allegations raised for the first time in the second amended petition for the following reasons:

> Claim IIC which alleges that trial counsel was ineffective for failing to ensure a proper evaluation of the petitioner is dismissed because Dr. Kreider was provided with all the materials required by statute and relevant to the inquiry;

Claim XXI is dismissed because no material evidence of perjury beyond that known to petitioner at the time of trial has been produced;

Claim XXII is procedurally barred under *Slayton v. Parrigan*, 215 Va. 27 (1974), since it could have been raised at trial and on appeal and was not;

Claim XXIII is dismissed because Doctor Kreider was qualified to make the sanity and competency evaluations and had available to him all materials relevant to his evaluations.

The claims related thereto having been dismissed, the Court denies the motions for discovery and for a live juror poll.

The Court reserves for a subsequent ruling the motion to enjoin counsel for the respondents from communicating with petitioner's trial counsel until the time set forth for delivery to opposing parties of all documents and the names of witnesses to be used at the evidentiary hearing.

For the reasons set forth in his memoranda in opposition to Respondents' first and fourth motions to dismiss, Petitioner objects to those rulings dismissing any part of his petition for a writ of habeas corpus, and to those rulings denying his various motions relating to this petition.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

Enter this 1st day of Oct., 1990

/s/ Illegible
Judge

Seen and objected to in part:

/s/ Illegible
Counsel for Respondents

Seen and objected to in part:

/s/ Illegible
Counsel for Petitioner

Certified to be a TRUE COPY on record in my custody. J. Curtis Fruit, Clerk
Custodian

BY: /s/ Barbara Illegible
Deputy Clerk

[Caption Omitted In Printing]

ORDER

This proceeding came on to be heard on October 23, 1990, upon the Second Amended Petition For a Writ of Habeas Corpus and the fourth Motion to Dismiss, the Petitioner appearing in person and by his attorneys, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, and the Respondent appearing by Eugene Murphy and Linwood T. Wells, Jr., Assistant Attorneys General.

This Court having heretofore dismissed all allegations in Petitioner's Second Amended Petition except Claims II(B)2, II(B)4, and II(E), set forth in paragraphs 183-189, 196-198, and 203-209, alleging that Petitioner's waiver of counsel was invalid, and Claims IV(B) and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable, after hearing the evidence of the parties and the argument of counsel, doth [sic] find for the reasons given at the conclusion of the hearing from the bench that Claims II(B)2, II(B)4, II(E), IV(B) and IX should be dismissed and the Petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the Second Amended Petition For A Writ Of Habeas Corpus be, and is hereby denied and dismissed, it is, therefore,

ADJUDGED AND ORDERED that the Second Amended Petition For A Writ Of Habeas Corpus be, and

is hereby, denied and dismissed, to which action of the Court Petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this order to the Petitioner, the Petitioner's counsel, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, the Respondent, Linwood T. Wells, Jr., and Eugene Murphy, Assistants Attorney General.

Entered this 26th day of November, 1990.

/s/ Illegible
Judge

We object to this:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: /s/ Illegible

/s/ Andrew R. Sebok
Andrew R. Sebok
Counsel for Petitioner

We ask for this:

/s/ Eugene Murphy
Eugene Murphy
Assistant Attorney General

/s/ Linwood T. Wells, Jr.
Linwood T. Wells, Jr.
Assistant Attorney General

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

On March 8, 1991 came the appellant, by counsel, and filed a motion for an order allowing him to perfect his appeal in this case, and a memorandum in support of that motion.

Thereupon came the appellees, by the Attorney General of Virginia, and filed a response in opposition to said motion.

On consideration whereof, the appellant's motion is denied.

A copy,

Teste:

/s/ Illegible
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

Finding that the appeal was not perfected in the manner provided by law, the Court rejects the petition for appeal in the above-styled case. Rule 5:17(a)(1).

A copy,

Teste:

/s/ Illegible
Clerk

Supreme Court of the
United States

91-5655

JOSEPH R. O'DELL

v.

THOMPSON, WARDEN, ET AL.

Certiorari denied.

Opinion of JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, respecting the denial of the petition for writ of certiorari.

This is a capital case. Since the present Term began on October 7, 1991, the Court has considered 102 capital petitions, each seeking review of a decision of a State's highest court. Even if practical considerations did not preclude review on the merits of all such petitions, another consideration often argues against granting certiorari: In many of these cases, a federal habeas proceeding is necessary to develop further the petitioner's claims, both factually and legally. This is one such case. Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review.

On February 5, 1985, a woman was murdered in a field behind the After Midnight Club in Virginia Beach, Va. Petitioner O'Dell had been at that bar during the evening. There was no evidence that he previously had known the woman or that they had spoken or departed

together. O'Dell left the bar some time after the victim did and went to another bar where he got into a fight. The following day, O'Dell arrived at his former girlfriend's house. Thereafter, the former girlfriend found bloodstained clothing in her garage and turned it over to the police. O'Dell was charged with murder.

Shortly before the trial, the court excused O'Dell's public defender because of an unspecified conflict. A new attorney was appointed, but O'Dell sought permission to proceed *pro se* after the attorney acquiesced in the Commonwealth's motion to have O'Dell examined by a court-appointed psychiatrist.[1] Following his examination by a local psychiatrist, the court found O'Dell competent to proceed *pro se* and ordered the attorney to act as standby counsel. Several times during the trial, the judge commented on O'Dell's inability to "emotionally control" himself, see, *e.g.*, 22 Tr. 44, and on one occasion informed O'Dell that his outbursts "concern me as to whether you are in fact in need of a reevaluation." 23 Tr. 21. Despite entreaties by standby counsel, the court refused to order a reevaluation.

The Commonwealth's evidence at trial consisted of tire tracks that were "similar" to those left by petitioner's car, blood tests, and testimony by a fellow inmate that O'Dell had confessed to committing the murder. The court refused O'Dell's request for a hearing on the reliability of the blood tests and allowed the technician to opine that the blood samples taken from O'Dell's shirt

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[1] O'Dell previously had been diagnosed as a paranoid schizophrenic and had engaged in erratic behavior prior to trial.

and jacket were consistent with samples taken from the victim. The court also denied O'Dell's proffer of evidence that the informant had offered to manufacture evidence in other trials as a means of avoiding prison terms.[2] O'Dell was convicted and sentenced to death. The conviction and sentence were upheld on appeal.

O'Dell continued to maintain his innocence during state habeas proceedings. He introduced the results of DNA testing that demonstrated that the blood found on his shirt either was not the victim's or could not reliably be linked to the victim. O'Dell also argued that the trial court erred in allowing him to represent himself, given his history of mental illness and his behavior at trial. See *Faretta v. California*, 422 U.S. 806 (1975); *Drope v. Missouri*, 420 U.S. 162, 181 (1975). The Virginia Circuit Court denied state habeas relief, specifically holding that the fact that current testing methods would have produced a different result does not justify the issuance of a writ of habeas corpus. The state court also ruled that O'Dell had been competent to represent himself.[3]

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[2] Subsequent to O'Dell's trial, the informant was given three years' probation on a breaking and entering charge, despite contrary assurances by the prosecution to petitioner's counsel and the court.

[3] Petitioner raised a number of other substantial federal claims, including a challenge to remarks made in the prosecutor's closing argument that petitioner previously had violated his parole. Standby counsel had complained to the trial court that the argument was made in such a way as to convince the jury that it had only two options: either sentence petitioner to death or turn him loose on the streets to kill again. In fact, petitioner could receive only the death sentence or life without parole. The trial court refused petitioner's request for a curative

Following the denial of state habeas relief by the Virginia Circuit Court, O'Dell filed a timely notice of appeal with the Virginia Supreme Court. Having interpreted the relevant subsection of the Virginia Code as providing for an appeal as a right, O'Dell's counsel then filed timely assignments of error.[4] On March 6, 1991, a week after the filing deadline, the Deputy Clerk of the Virginia Supreme Court and the attorney for the Commonwealth informed petitioner's counsel that, in their opinion, O'Dell did not have an appeal as of right and thus O'Dell also needed to file a petition for appeal. At the same time, the Commonwealth's attorney allegedly informed petitioner's counsel that he would not oppose O'Dell's supplementation of his filings with the additional document. Two days later, however, when O'Dell filed a motion to perfect his appeal, the Commonwealth

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instruction or a chance to rebut the prosecutor's misleading statements. In his state habeas proceedings, petitioner argued that the trial court had violated *Gardner v. Florida*, 430 U.S. 349 (1977), which held that a defendant is denied due process of law when his death sentence is imposed, at least in part, on the basis of information that he had no opportunity to deny or explain. The Virginia Circuit Court held that this challenge was barred by res judicata under *Hawks v. Cox*, 211 Va. 91, 175 S. E. 2d 271 (1970).

[4] A Virginia statute provides that a habeas decision in a capital case is appealable directly to the Virginia Supreme Court. See Va. Code Ann. § 17-116.05:1(B) (1988); *Hill v. Commonwealth*, 8 Va. App. 60, 69, 379 S. E. 2d 134, 139 (1989). The wording of this statute – "appeals lie directly to the Supreme Court" – suggests an appeal as of right, rather than a discretionary petition for appeal. The other categories of cases listed in this subsection require the filing of assignments of error, not a petition for appeal.

opposed the motion. On March 15, O'Dell filed his petition for appeal. On April 1, the Virginia Supreme Court denied O'Dell's motion and rejected his appeal. The Commonwealth now argues that the Virginia Supreme Court's rejection of O'Dell's appeal bars review of the merits of the federal questions raised by O'Dell in the Commonwealth's courts.

The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985), the Virginia Supreme Court's rejection may not be based on an independent state ground because *Tharp v. Commonwealth*, 211 Va. 1, 175 S. E. 2d 277 (1970), requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.[5] The Virginia Supreme Court's rejection of O'Dell's appeal may also be an inadequate state ground. In *James v. Kentucky*, 466 U.S. 341 (1984), this Court held that only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims. The ambiguity of the Virginia statute, Va. Code Ann. § 17-116.05:1B (1988), as

[5] While this Court rejected a similar argument in *Coleman v. Thompson*, 501 U.S. 722, 742 (1991), this case may be distinguishable. *Coleman* dealt with an untimely *notice* of appeal, not an untimely *petition* for appeal. Since the notice and assignments were timely, the Commonwealth was not unaware of petitioner's arguments, as it arguably was in *Coleman*. The Commonwealth's initial willingness to extend petitioner's time to perfect his appeal provides additional evidence that Virginia can waive the untimeliness rule when fundamental constitutional issues are at stake.

to whether capital appeals are discretionary or as of right may preclude its use as a procedural bar.[6] See also *Ford v. Georgia*, 498 U.S. 411 (1991) (state practice must be firmly established and regularly followed in order to prevent subsequent review by this Court); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (application of procedural rule was pointless, severe, and consequently inadequate as jurisdictional bar to review).

Finally, federal review of O'Dell's claims is possible if it is necessary to prevent a fundamental miscarriage of justice, see *Coleman v. Thompson*, 501 U.S. 722, 757 (1991), or if the constitutional violation caused the conviction of an innocent person. See *McCleskey v. Zant*, 499 U.S. 467, 502 (1991).

In short, there are serious questions as to whether O'Dell committed the crime or was capable of representing himself – questions rendered all the more serious by the fact that O'Dell's life depends upon their answers. Because of the gross injustice that would result if an innocent man were sentenced to death, O'Dell's substantial federal claims can, and should, receive careful consideration from the federal court with habeas corpus jurisdiction over the case.

[6] As has been noted, see n. 4, *supra*, the wording of this statute – "appeals lie directly to the Supreme Court" – suggests an appeal as of right, rather than a discretionary petition for appeal. According to petitioner's counsel, even the Clerk's office and the Commonwealth's attorney were uncertain as to whether petitioner was entitled to an appeal as of right.